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POTIER, F. J. B.

[THE CASE OF IMPOTENCY]

THE

PLEADINGS

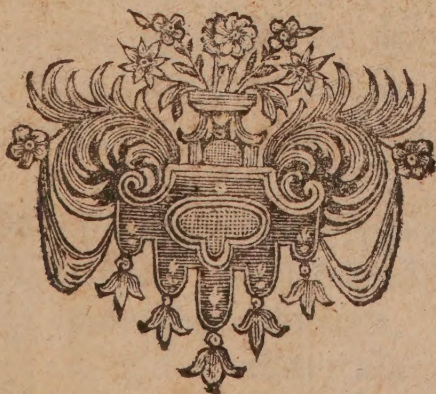
FOR THE

Marquis de GESVRES

Against the

MARCHIONESS.

VOLUME II.



LONDON:

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THE
PLEADINGS

FOR THE

Marquis de GESVRES, &c.

MEMORIAL *for the Marquis de
GESVRES, against the Marchioness
de GESVRES, his Spouse, who sues
for a Dissolution of her Marriage.*



THE Marquis de Gesvres, and his
Family, well hoped they had
undergone enough, in being
oblig'd to entertain the Pub-
lick with the unhappy Divisi-
on between a Husband and his Wife, in a
Court of Judicatory, without rendering the
Circumstance thereof yet more publick, by
A 2 prin-

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printed Cases; and they were of Opinion, that it was better to rest upon the Attention of the Judges, and leave their Reflexion to work upon the Oral Pleadings they had heard, than to possess them, and perhaps fatigue them, with an irksom Repetition by Writings.

But the Advantage which the Emissaries of *Madam de Gesvres* flatter themselves they shall reap from spreading abroad so many Prints; their insulting and reproaching the *Marquis de Gesvres*, upon the Moderation of his Defenders; the long Space of Time which is elaps'd since the *Pleadings*; the Necessity also of expostulating upon certain Points of the learned Promoter's eloquent Plea, and of reconciling some fundamental Maxims of the Cause, have at length forc'd us to break Silence.

We shall however make it our Care to be as tender and circumspect as possible in Point of Terms. Tho' the *Marquis de Gesvres* be the Party offended, yet he does not forget, that she who offends him is his Wife. We shall not envy the Defenders of *Madam de Gesvres* the Pleasure of shining in Burlesque Ideas and Satyricall Smartnesses: It often happens, that he who thinks to divert the Publick, scandalizes them; and a Cause so important as this, for the Dignity of the Sacrament, which

which is the Subject of it; for the Credit and Honour of the Families so unfortunately concern'd, and for the unaccountable Effects which may flow from it, requires to be treated in a serious Manner, becoming the Reverence of a Tribunal, the Quality of the Parties, and even the Respect that's owing to the Publick.



State of the QUESTION.

BOTH Parties build their Defence alike, upon the two Reports of the Searchers. The Marquis founds his upon the first Part of those Reports, and the Marchioness *des Gesvres* supports hers upon the second.

By the first Part of the Reports, all the Searchers unanimously have own'd the Marquis to be very well conform'd. We may dispense with our selves, from repeating here the Terms; the Judges have them before their Eyes; and Madam *de Gesvres* has given herself the Pleasure to transcribe them into her printed Case.

From hence the Marquis *de Gesvres* concludes, that the Proof is a competent Proof, and that even now, without the Assistance of any Interlocutory Order, there is Grounds

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for rejecting the Marchioness's Demand for a Nullity of her Marriage.

By the second Part of the Reports, the Searchers say, from their own Authority, that a good Conformation is not enough; that together with such Condition, they desire Tokens which did not appear to 'em; and the Searchers named by *Madam des Gesvres*, add, that altho' the Marquis had one of those Tokens, yet they must visit the Body of the Marchioness.

From hence the Marchioness *de Gesvres* concludes, that if the Searchers, after having commended what they saw in the Person of the Marquis, have yet doubted upon what they did not see, the Judges ought to doubt with them; and that to settle their Doubts, her Person must be search'd to find what the Searchers have not found in her Husband's.

Between these two opposite Systems, the Question is, What, in the true Doctrine of the Church, and the present Condition of the Law, are the legal, necessary, and sufficient Proofs in an Impeachment for Impotency?

It shall be shewn in the first Part of this Memorial, that good or evil Conformation is the only necessary, the only lawful Proof, and that in the true Doctrine of the Church, and the present Condition

of the Law ; the other Proofs, as being either unlawful, or uncertain, are to be set aside, and rejected.

In the second, shall be confirm'd by particular Circumstances what shall have been laid down by the general Principles in the first ; and at the same Time Answer shall be made to Objections.



P A R T I.

Wherein is shewn, That in the true Doctrine of the Church, and in the present Condition of the Law, good or evil Conformation is the only necessary, the only lawful Proof ; and that the other Proofs, as being either unlawful or uncertain, are to be set aside and rejected.

UPON this System of Religion and Law, both together, our whole Cause turns.

It is founded, in the first Place, upon the Spirit of the Church, and the Purity of its Doctrine ; with which neither the other Proofs, heretofore in Use, nor those which some People would substitute in their Place, can lawfully stand.

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In the second Place, upon the Maxim of our Superiour Courts, which in the Abolition of the Congress, have bury'd those same Proofs, which are attempted to be introduc'd or reviv'd at this Time.

First Mean, founded upon the Spirit of the Church, and the Purity of its Doctrine.

The Spirit, or Mind of the Church, is no other than that of JESUS CHRIST; in the Institution of the Sacrament of Marriage; and as the Mind of *Jesus Christ*, in raising Marriage to the Dignity of a Sacrament, was to render it indissoluble, the Mind or Intention of his Church is, not to admit, without evident Certainty, any Means that can tend to dissolve it, and consequently to reject all Proofs which in their own Nature, or upon Experience, are found to be uncertain.

In this Indissolubility consists the sacred Parallel of the Union between the Husband and Wife by the Sacrament, and the Union of *Jesus Christ* with his Church by his Grace.

The Gospel, which is our Law, teaches us, That before the Time of *Jesus Christ* Divorcement was a Way which the *Mosaic* Law had allow'd the *Jews*, *ad duritiem cordis* for the Hardness of their Heart: And

was to put an End to the Abuse of it, that *Jefus Christ* pronounc'd this contrary Law; *Quod Deus conjunxit homo non feparet; quicumque dimiferit uxorem fuam, & aliam duxerit, adulterium committit fuper eam: Et fi uxor dimiferit virum fuum, & alium nupferit, mæchatur.* What God hath joined together let no Man put afunder: Whofoever fhall put away his Wife, and marry another, committeth Adultery againft her: And if a Woman fhall put away her Husband, and be married to another, ſhe committeth Adultery, *Mark x. 9, 11, 12.*

For the well underftanding of the Conſequence and Effect of this Indiffolubility, according to the Intention of the Church, and the Object of our Cause, we muſt lay down two Principles which cannot be conteſted.

The firſt, which both Sides agree to, that as what is in its Eſſence indiffoluble cannot be diſſolv'd, ſo there can be no proving that a Marriage is diſſolv'd, but by ſuppoſing for certain, evidently certain, that the Marriage has not exiſted; that there had been a Celebration, but no Sacrament. For this Reaſon it is, that in the Actions which are brought againſt Marriage, they always conclude in a Declaration of Nullity. 'Tis a Non-Exiſtence rather than Diſſolution of Marriage; for had there

been a Marriage, not all the Power on Earth, no, not that of the Church itself, can dissolve it.

The second Principle, which is a necessary Consequence of the first, is, that to shew there has been no Marriage; that a Marriage, tho' solemniz'd, does not exist; there must be a real, certain, evident Fault, either with respect to the Subject, or with respect to the Form, which did obstruct the Sacrament. The Church and the Laws, have declar'd certain Impediments which cancel a Marriage, as Want of Age in those who are not arriv'd to Puberty; Want of Consent, or invalid Consent in the Marriage of young Heirs and Minors; the Default of a proper Priest, &c. but they admit none of those Impediments, unless made out by certain, evident, and infallible Proof.

Therefore, if Impotency be receiv'd as a Cause of Dissolution of a Christian Marriage, it neither is, nor can be so, in the Intention of the Church, any farther than as it is founded upon certain and evident Proof; the Impotency, in a Word, must be manifested, and brought to Light; because the Spirit of the Church does not suffer, that the Dignity of a Sacrament, the Condition of Persons whom it has ty'd together, should depend upon the Event of a lame,
ambi-

ambiguous, or uncertain Proof; and to admit for a Dissolution of Marriage, a doubtful or casual Proof, is to destroy or endanger the Indissolubility of the Sacrament pronounc'd by *Jesus Christ*.

These Principles, pre-suppos'd, in order to make a discreet Judgment of the said Proofs, as to their Utility or Inutility, their Use or Abuse, let us examine the Discipline of the Church in two different Periods of Time.

The first, during the twelve first Ages, wherein the Church (at least. the *Romish* Church, took no Cognizance of Accusations for Impotency.

The second, beginning at the thirteenth Century; since when the Church has, by little and little, admitted such Complaints, and accepted the different Proofs thereof, as shall be hereafter explain'd.

In these two different Periods; tho' the Discipline has vary'd, the Doctrine has ever been the same. Discipline, which is the Work of Men set over the Church to govern it, is alterable for prudential Reasons, according to the Difference of Circumstances of Time and Place; but the Doctrine, which is deriv'd to the Church from *Jesus Christ*, is as invariable as its Author, and depends neither on Time nor Place; thus Marriage, since its Institution

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by *Jesus Christ*, has always been indissoluble, in the second Period, as well as the first; it is so still, and ever will be so.

By this Immutability of Doctrine we shall reconcile both Periods, and see that these Changes in Discipline, instead of contradicting our System, will serve to confirm it.

In the first Ages, when the Ecclesiastical Discipline, being nearer its Source, was the more pure and limpid, there were Impotents, as there has been since; what Answer did the Church in those Days give to troublesome Wives, who complain'd of their Husbands Insufficiency; or to the Husbands, who accus'd their Wives thereof? She gave them, for Decision, the Law she had receiv'd from *Jesus Christ*; the same Law which *Jesus Christ* had pronounc'd to the *Jews*: *Quod Deus conjunxit homo non separet*. Perswaded of the Danger of the Consequences, she held for a Rule, that the publick Welfare of the Church was preferable to the particular Interest of a complaining Wife; and that it was less inconvenient to let alone the Marriage of one Impotent, than to expose the Marriages of many to the Hazard of a false Accusation, and the Uncertainty of its Proofs; *tolerabilius est enim* (says Pope Innocent III, speaking

speaking of uncertain Proofs) *aliquos contra statuta hominum dimittere copulatos, quam conjunctos legitime contra statuta Domini separare.* Thus the Church, fearing to be impos'd upon either by the Wife or Husband, or the Collusion of both, shut its Ears against their Complaints, and gave them for a Rule, that if they could not live together like Husband and Wife, they should live together like Brother and Sister.

How remote was this from those false and impure Maxims, which the Advocates of Madam de Gesvres (for the pretended Quiet of her Conscience) furnish her with in their Writings, *viz. That the Essence of the Sacrament of Marriage, its Relation with the Union of Jesus Christ and his Church, consists only in the Commixtion of Bodies, which are not confounded, melted together, and identify'd into one and the same Flesh, but by Consummation!*

An Idea so unbecoming the Sacredness of a Sacrament, would be unpardonable in any, but a Man who owns he is no Divine. This may be said, that the Sacrament purifies and purges away what was gross and impure in Marriage; and it is talking like a Christian Lawyer; but to say, that 'tis this Conjunction of Flesh and Blood *that forms the Union,*

* S. Augustin, l. 5. de Julian. c. 12. num. 48.

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Union, representative of that of Jesus Christ and his Church, is talking like Julian the Pelagian who pretended, *nuptias nihil aliud esse quam corporum commixtionem*, and whose Opinion has been condemn'd by some as a Heresy and by all as an Error; 'tis talking more unworthily of Christian Marriage, than even the Heathens did of theirs; they laid it down as a Maxim, that *nuptias consensum facit, non concubitus*; and that *per maris & feminae conjunctionem non tam corporum, quam animorum & voluntatum copulationem intelligitur*. 'tis accusing the Church of having been in an Error for twelve Centuries: For if Consummation was the Substance of Marriage, if the Marriage of Christians consisted essentially in that mutual Tradition or Delivery of each other's Bodies; if there had been no Sacrament at all in Cases where such Delivery had not been, how could the Church, either by way of Precept or Counsel, say to those Christian Wives, *If your Husband cannot live with you as a Husband, do you live with him as a Sister?*

'Tis to no Purpose to say, that arbitrary Divorce (which was authoriz'd by the Civil Laws, and the *Novelle* of Justinian, which makes Impotency one of the just Causes of Divorcement, afforded an ever-ready Help for Wives to unty themselves. Divorcement was indeed authoriz'd by the Civil

Laws

Laws; but it was exprelly forbid by the Gospel and the Laws of the Church; and 'tis the Mind of the Church we are now seeking for. Christian Wives thought themselves so little intitl'd to lay hold of those Laws to unty themselves, that we see, even in the Canons cited for *Madam de Gesvres*, that they who complain'd of their impotent Husbands, address'd themselves to the Popes and Bishops, as their natural and competent Judges, because the Civil Power could not disengage them in Safety of Conscience, nor preserve them, by Divorcement, from Bigamy or Adultery. We are not now examining what was the Civil Law with respect to the Pagans, but what was the Ecclesiastical Law with respect to the Christians; a Law so exactly follow'd in those primitive Times, that the same Canons tell us, that instead of admitting occult Impotencies and conjectural Proofs, the Church then did not so much as receive manifest ones.

The Reproach that's thrown upon us of an Anachronism of 600 Years in that first Period, is only an affected Quibble, which, instead of promoting the Cause of *Madam de Gesvres*, may be retorted upon herself.

It is true, that in the 7th Century, we find in the Church of *France* two Decisions
about

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about Marriage; one in the Council of *Verberie*, in 752.

The other in the Council of *Compeigne* in 756.

But not to enter now into critical Dissertations upon those two Councils, we may say, with respect to that of *Verberie*, that besides its not appearing clearly that Impotency was the Point in Question, we must not altogether look for the true Discipline of the Church in that Council's Canons: the Indulgence given by Canon XVII, taken from *Ives de Chartres*, cited by *Madame de Gesvres*, is not at all surprizing, when we find in Canon XI, that a private Man, who, thro' Necessity of Affairs, or to follow his superior Lord, travels into another Province, his Wife, thro' a Fondness for her Family or Fortune, refusing to follow him, if he cannot contain from Women, is at Liberty to marry another; this is a Remnant of arbitrary Divorcement. 'Tis suppos'd such a Discipline will not be propos'd as an Example in our Times.

As for the Council of *Compiegne*, it declares, in Canon XVII, that if a Woman that has been marry'd some Time, complains that her Husband has not had carnall Knowledge of her, and the Husband alledges the contrary, the Oath of the Husband must

must carry it, *in veritate viri consistat, quia vir est caput mulieris.*

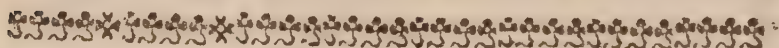
The Church of *France* was, in those Times, the only Church that lent an Ear to Accusations of Impotency. We don't find the *Roman* Church gave Way to them before the End of the 12th Century, or Beginning of the 13th; nay, we find since that, she has often rejected them without hearing.

But in what Manner did even the Church of *France*, at that Time, receive this Kind of Complaint; and what Sort of Proof did she expect in such Cases? Far, very far, from admitting those unclean Proofs, those obscene Denudations, so unworthy of the Purity of Christian Manners, and the Sanctity of a Sacrament; she admitted no Visitation, either of the Wife or Husband; but believ'd, (according to that Canon of the Council of *Compiègne*) that for the Honour of the marry'd State, they ought to acquiesce in the Veracity of the Husband only.

Thus the Decision of that Council, when well understood, was not so much meant to favour Complaints of Impotency, as to check them, by tying down the Wife to the sole Affirmation of the Husband.

Therefore, if *Madam de Gesvres* is to be judg'd by the Discipline of that first Period,

od, the Court must either, according to the Discipline of the *Roman Church*, dismiss her Petition without Hearing; or, according to that of *France*, abide by the Affirmation which has been made by the *Marquis de Gesvres*, her Husband.



The Second Period of Time-

IN the second Period, it is true, the Discipline has chang'd; Accusations of Impotency did gradually become more frequent; different Proofs have been allow'd, as appears from the Text of the Canon-Law; but the more the Proofs have vary'd, the more has the Church acknowledg'd the Uncertainty and Inconveniences of them; the more we may conclude, according to the Spirit of the Church, that it is dangerous to admit them, and that it concerns the Christian Polity, and the publick Repose, to reject them.

'Tis principally, from the Decretals, intitled, *De Frigidis & Maleficiatis*, and in some, intitled, *De Probationibus*, that *Madam de Gesvres's* Advocates take the Foundations of their System; and 'tis in those very Decretals where we hope to find the Establishment and Confirmation of ours.

We

We shall there see, that the Mind of the Church, even in this second Period, has always been either to reject absolutely the Complaints of Impotency, as in the first Period; or not to allow Impotency to be a Means of nullifying Marriage, unless it was founded upon a manifest and infallible Proof.

To set these Truths in their proper Light, there are three Things, in this Period of Time, to be examin'd.

I. The different Proof, which have been in Practice in Accusations of Impotency.

II. The Quality and Difference of the Judgments pass'd by the Church upon those Proofs.

III. The Inconveniences which the Church has own'd to be in the Use of most of those Proofs.

As to the Difference of the Proofs, there are observ'd to be four Sorts in the Texts.

1. The Affirmation of the Husband accus'd of Impotency.

2. The Inquisition, *per septimam manum*, super-added to the Oath of the Parties. This was a Sort of Notoriety by the Testimony of seven Persons, either Kinsfolks or Neighbours, who attested that the Parties had set forth the Truth.

3. Trien-

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3. Triennial Cohabitation.

4. *Aspectus corporis* : Visitation of the Body.

It is not to be believ'd, that these several Proofs were propos'd by the Decretals as a successive Order of Interlocutories, to be necessarily run through one after the other; on the contrary, it appears they were so many different Proofs, which used to be apply'd to different Cases; and 'tis in this Distinction of Cases, that the whole Exposition of this Matter consists.

Sometimes 'twas the Wife who tax'd her Husband with Inability; 'twas sometimes the Husband, who complain'd of the Wife upon the same Account; and sometimes they accus'd each other.

When the Wife complain'd, she did it either to procure the Liberty of taking another Husband, or with a Design of devoting herself to God, in a religious Retirement.

In the first Case, namely, when the Wife accus'd her Husband of Impotence, in order to throw herself into the Arms of another Man, she us'd to come and tell the Bishop, with a Sort of an impudent Simplicity, *Volo esse mater, volo procreare liberos, & ideo maritum accepi; sed vir, quem accepi, frigida natura est, & non potest illa facere propter quæ illum accepi.* The Canons made likewise a Distinction;

Distinction; either the Husband deny'd the Fact, or he agreed to it.

If the Husband deny'd it, they knew of no other Rule, than that of the Council of Compiègne, viz. *Viri standum veritati, si id firmaverit juramento, quia vir caput mulieris*: This is the Decision of Chapter *Si quis* in the Decree of Gratian, which he took from the Council of Compiègne.

'Tis that of Chapter *accepisti, de frigidis & maleficiatis*; of Chap. *continebatur, de dispens.* Impub. This last Decretal is Pope Alexander the III^d's, in 1180.

If, on the contrary, the Husband agreed to the Fact, both of them unanimously declaring, that the Marriage was not consummated, they did not content themselves with their Declaration only, but added thereto the Proof, which the Canons call *per rectum judicium*, or *per septimam manum*, namely, the Testimony of seven Persons, their near Kindred or Neighbours, who attested, that the marry'd Couple had set forth the Truth. This is the Case of Chapter *Laudabilem* of Celestin the III^d, in 1195, and of Chap. *Litteræ* of Honorius the III^d, in 1220.

The Difference of these two Cases, is remarkable; † and the Reason which the Gloss

† On Chap. *Accepisti* in verbo probari.

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Gloss gives for it, will perfectly find its Application hereafter.

The Husband's Oath is to carry it, when the Point is to make Marriage subsist; but when it is attempted to be annull'd, neither the Husband nor the Wife is credited; *pro matrimonio pene creditur iis*; by Reason the Cause of Marriage is always the most to be favour'd, or as we say, to have the better End of the Staff: *contra matrimonium non est standum eorum confessioni, & si uterque confitentur, non iis credendum, ne in fraudem hoc diceretur factum.*

When the Wife pretended herself a Virgin, in the Design of turning Nun, she used to go and tell the Judge, *I have a Mind to retire into a Monastery; and tho' I'm married, my Case is such, that I can quit my Husband, and consecrate my self to God; whether it be the Coldness of his Affection, or the Frigidity of his Body, I know not; but my Husband has not shewn himself a Husband with Respect to me; he has therefore no Right to retain me as his Wife, or to oppose the Use I am going to make of my Person; not to give my self up to any other Man, but to deliver my self over to the Spouse, Jesus Christ, in a Convent.* There either the Husband consented, and own'd that there had been no Consummation, or he oppos'd it, by averring that the Marriage was consummated.

If the Husband own'd his Wife to be a Virgin, and consequently capable of turning Nun, they requir'd no other Proof but such Acknowledgment of the Husband, *id-que favore Religionis.*

If, on the contrary, the Husband opposed it; if, to retain his Wife with him, he stood to it, that the Marriage was consummated, they did not require of her, in that Case, as they would have done if she had long'd for another Husband, namely, that she should be tyed down to the Oath of her Husband, as her Head, because she separated herself from him, on Purpose to submit herself to the chief Head of all, in a religious Retirement: But as, even in this Case, the Wife's Action tended to a Dissolution of the Marriage, *erat contra Matrimonium*, they did desire, and enjoin, besides her Oath, the Inquisition, *septima manu*, the Testimony of Matrons, who were to affirm, that they had inspected her, and found her a Virgin.

In Chapter *Causam de probationibus*, of Pope *Innocent III*, there is a Case, the Nature whereof, and likewise the Decision, are equally remarkable. A Wife, pretending herself a Virgin, withdrew into a Convent: She had taken the Precaution to cause herself to be inspected by seven Matrons, who had attested her Virginity: The Husband

band re-demanded his Wife; he call'd in
 Question, either the Fidelity, or the Capa-
 city, of the seven Matrons; and, *quia*, says
 the Canon, *sæpe manus fallitur & oculus ob-*
stetricum, because the Eye and Hand of the
 Midwives may be often deceiv'd, the Pope
 orders the Bishop who consulted him, to
 employ, a second time, creditable Matrons,
 and such as were skilful and prudent, to
 examine *utrum dicta puella Virginitatis privi-*
legio sit munita.

Wherein it is to be observ'd, by the By,
 that if, in this Case, the Pope orders the
 Wife to be inspected, there are two concurr-
 ent Circumstances, which render'd it both
 lawful and necessary.

1st. The Question was not about the
 Husband's Condition, but the Wife's; who
 for taking the Veil upon her, had no need
 to prove that her Husband was impotent
 but only that she was a Virgin.

2dly, 'Twas the Husband himself who
 challeng'd this Inspection, and which is
 decisive on these Occasions, he demanded
 it *pro Matrimonio*, in order to strengthen
 and confirm the Marriage.

When the Husband and Wife reciprocal-
 ly accused each other of Impotence, and
se non posse carnaliter commisceri, they us'd
 to follow the same Rule above recited
 namely, the Oath of both of them, and the
 Inquisition

Inquisition *septima manu*, as well on the Side of the Husband, as the Wife, to guard against Collusion. This is one of the Cases of Chap. *Laudabilem*, which shall be spoken to presently.

There remains two other Sorts of Proof, Triennial Cohabitation, and Inspection of the Body.

As for Triennial Cohabitation, it is spoken of in Chap. *Laudabilem*, and in Chap. *Litteræ de frigidis & maleficiatis*.

In Chap. *Laudabilem*, which is of *Celestin III.* there's a Distinction of Cases.

The first, where, the Wife being the Complainant, there is order'd the *Triennium*, to be reckon'd from the Day of Marriage; after which Time, if she continues to complain of her Husband's Impotency, the Pope is of Opinion, that *si mulier per justum judicium de viro probare potuerit quod cum eâ coire non possit, accipiat alium*.

Upon these Words, *si de viro probare potuerit, per justum judicium*, the Gloss says, *id est per testes vel per aspectum corporis*, that is, by inspecting, not the Wife, but the Husband.

The second Case is of a marry'd Couple, who unanimously declar'd, *quod nunquam se invicem cognovissent*; and, in that Case, by adding to their Oath the Testimony, *per septimam manum*, they were both restor'd to

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their Liberty, to do with their Persons as
they thought fit.

But in both Cases this Condition was understood, that if there was any Falshood detected, the Husband and Wife were oblig'd to return to each other, *ad priora connubia redire*, as shall be more particularly explain'd hereafter.

In Chap. *Litteræ* of *Honorius III*, the Husband and Wife, after eight Years Marriage, in which there had been above three of continued Cohabitation, jointly declar'd, *quod non poterant carnaliter commisceri*; the Husband, owning his Incapacity, submitted himself to the Counsel of the Church. In these Circumstances the Pope resolv'd, that after the Inquisition, *septima manu*, they might be separated.

In all this there's no visiting the Wife at all: But that we may omit nothing, we shall give an Account of both the Chapters which speak thereof.

The first is Chap. *Fraternitatis*, where the Dispute was not about the Husband's Ineptitude, but the Wife's: And as in Chap. *Laudabilem*, a Visitation of the Husband was desired, because his Impotency was the Thing question'd, in this there's an Inspection of the Wife order'd, because her Ineptitude was the Thing in Dispute.

The second is Chap. *Proposuiſti de probationibus*. This is the Text which Madam *de Geſvres's* Advocates ſtick to, as their principal Fortreſs. If we give Credit to that Decretal which is aſcrib'd to Gregory VIII, That Pope is of Opinion, that a Wife, affirming *ſe nec a viro cognitam, nec potuiſſe cognosci*, and backing her Oath with the Teſtimony of ſeven Women, who had inſpected her, and attested, *per aſpectum corporis*, that ſhe was a Virgin, tho' the Huſband ſwore to the contrary, the greateſt Credit was to be given to the Oath of that Wife and to Teſtimony of thoſe other ſeven.

We ſhall ſhew how unſerviceable this Decretal is to Madam *de Geſvres's* Cauſe; but not to break in upon the Method we have propos'd to our ſelves: After having exactly cited the different Proofs employ'd in the Decretals, we ſhall ſet to View, from divers Judgments of Popes, the little Streſs they themſelves laid on thoſe Proofs.

In the Decretals there are obſervable two Sorts of Opinions, or Judgments, very oppoſite, given by the Popes in Cauſes of Impotency, in that ſecond Period of Time.

Some abſolutely ſhut their Ear to all Accuſations of Impotency.

Others liſten'd to them, and admitted different Proofs, but under the Rules

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and Conditions which shall be taken Notice of in a Moment.

Pope *Alexander III.* began, in 1180, not to approve of, but to tolerate, with Reluctance, in the Church of *France*, Complaints of Insufficiency, contrary to the Discipline and Custom of the Church † of *Rome*: *Id nos patienter tolerabimus*; these are the Words of that Pope, in his Answer to the Bishop of *Amiens*, Chap. *Quod sedem*, re-
for'd by Monsieur *Pithou*.

The Popes, who immediately succeeded *Alexander III.*, follow'd neither his Example nor Opinion. Perswaded of the Danger of the Toleration, instead of saying as he did, *id nos patienter tolerabimus*, they, on the contrary, answer'd, sticking to the Spirit of the Church, and its primitive Discipline, *Romana Ecclesia consuevit judicare ut quas tanquam uxores habere non possunt, habeat ut sorores*. This is the Answer of *Lucius III.*, in Chap. *Consultationi*, even though the Question was about real and manifest Impotency, thro' an ill Conformation.

Among the Judgments of other Popes, who admitted Complaints, either of Wives or Husbands, on Account of Inability, some admitted no Proof but that of evil Conformation. Such is the Case of Chap. *Acce-*
pisti,

† *Alexander III.* Chap. *Quod sedem*.

pissi, where was a visible Defect in the Husband's Person. Such is that of Chap. *Ex Litteris*, where the Wife was manifestly defective in her Person, *vitium a naturâ contractum, quod nec ope medicorum poterat adjuvari*.

If other Popes, more indulgent to the Weakness of those Wives, who came and dinn'd 'em i'th' Fars; *Volo esse mater, volo procreare liberos*, &c. have admitted the different Sorts of Proofs abovementioned, 'twas with such Precautions, as plainly shew the little Confidence they themselves put in those Proofs.

Persuaded of the immutable Doctrine of the Indissolubility pronounc'd by *Jesus Christ*, which his Ministers were never allow'd to violate, they fram'd to themselves two Rules in such Cases.

The first, that whatever Proof was admitted, whatever Judgment was pronounc'd, *de talibus judicium pendeat ex futuro*: † The Church foresaw, and had often experienc'd, that she might be deceiv'd in such Proofs, either by the Wickedness of the Wife, or the Imposture of the Husband, or the Collusion of both; that the Witnesses, in Compliance to the Parties, might lie; that the Matrons might either be misled thro'

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Ignor-

† Innoc. III. Chap. Fraternitatis.

Ignorance, or mislead others through Corruption.

Thus, when the Church receiv'd those Proofs, when upon those Proofs she pronounc'd Judgment, it was always a provisional and conditional Judgment, under the Condition, that if afterwards the Fact should appear to be otherwise, *si reus perjurii inveniaris*, the admitted Proofs should go for nothing, and the Judgment, being conditional, should fall to the Ground with the Proofs.

The second Rule, that *¶ Sententia contra matrimonium lata non transit in rem judicatam*; because the Judgment being conditional, and the Condition depending upon an Event which was ever doubtful, it was never true to say absolutely and definitively, that the Marriage was dissolv'd, so long as the *Factum*, which had serv'd for a Foundation to the Dissolution, might be found fictitious, and the Proof false or collusory.

Hence it came to pass, that Falshood being detected, Fraud discover'd, the Church, inviolably sticking to the sacred Law of Indissolubility, oblig'd the Wife to quit the new Husband she had taken, and return to the former; and the Husband to forsake his new Wife, and take
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the other again, for the Reason which the same Gloss gives, *cum appareat ex post facto, Ecclesiam fuisse deceptam, priora matrimonia restaurantur.*

Is it at all to be doubted, that the Church, the faithful Spouse of *Jesus Christ*, has often groan'd at the discovering of these Impostures, and with a just Griet beheld the provisional Dissolutions, as so many Attempts made by little and little upon the Indissolubility of the Sacrament, that she has with Pain endur'd all this Scandal, of making marry'd People pass from a first Marriage to a second, of making them return from the second to the first, and of keeping Citizens and Christians thus in a perpetual Uncertainty as to their Condition, and in continual Adulteries, when they had made Use of Fraud to obtain their Separation. Adulteries which the provisional Judgments did not excuse; the Law of *Jesus Christ* is too plain for them to do it; *si vir dimiserit uxorem suam, & aliam duxerit, adulterium committit super eam; & si uxor dimiserit virum suum* (no Matter whether it be done by an arbitrary Divorce, or by a false Accusation of Impotence) *mæchatur.*

From this Discussion of Decretals we may draw two very certain Inferences for our Cause.

The first is, that from all these Decretals, so different, and often even so contrary to each other, no general Rule can be drawn, whereby to fix the Choice or Kind of Proofs, in Accusations of Impotence; and that the Distrust which the Popes themselves were in of the Uncertainty of these different Proofs, plainly shews the little Account the Church ought now to make of them.

The second is, that from these different Decisions of Decretals, there is not one, but what is either against, or is of no Use to *Madam de Gesvres*.

If she consults Chap. *Consultationi*, she will there find, that it was a Favour that her Complaint was receiv'd; and that, according to the Custom and ancient Discipline of the Church, it might have been rejected.

If she has Recourse to Chap. *Accepisti*, and to Chap. *Continebatur*, she will there learn, as well as in the Council of *Compiègne*, *Standum juramento mariti*; and that the Cause is already decided against her by the Affirmation of her Husband.

If she adheres to Chap. *Laudabilem*, and to Chap. *Litteræ*, for the Visitation *septimâ manu*, she will there see, as well as in Chap. *Accepisti*, that this Proof, besides the Oath, was desir'd but in two Cases; one, when
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the Husband agreed as to his Impotence, or when the Husband and Wife mutually accus'd each other; t'other, when the Wife pretended herself a Virgin, to change her Condition of a Wife into that of a Nun.

If she wants any thing else in the same Chapters, she will, in the first Place, find in Chap. *Laudabilem* the triennial Cohabitation; but she will not find in it the Visitation of the Wife's Person.

As for the Interlocutory of the *triennium*, she does not like it; she has taken great Care to defend herself from it by a particular Memorial; and if, by her own Confession, that Expedient has its Inconveniences and Doubts, what Opinion ought to be had of all the others?

In the second Place, she will find in Chapter *Causam*, that the Visitation of the Wife, for Proof of her Virginity against the Denial of the Husband, is granted only *favore Religionis*.

To conclude, she will find in those same Chapters, than when the Point in Dispute was the Sufficiency or Insufficiency of the Husband, the Husband was order'd to be visited, *si de viro appareat*; and that that of the Wife was never us'd, but when the Point in Dispute was either her Capacity with respect to Marriage, or her Virginity with respect to Religion.

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If she fortifies herself in Chapter *Proposuit*, which she seems most to rely upon, she will soon be disabus'd, as to the Advantage she flatters herself she shall draw from it.

This Decision, according to the Explanation put upon it for Madam *de Gesvres*, would be very unaccountable. The preceding Popes had decided, that when the Wife accused, and the Husband deny'd, *standum juramento mariti, quia vir caput mulieris*: They did not admit either the Oath of the Wife, or the Visitation of her Person, as a Proof of the Impotence of the Husband; and if we will believe the Defenders of Madam *de Gesvres*, 'tis upon those very Proofs, that that Pope decided the Cause.

Would that Pope, who had been scarce settled in the Chair, which he had possess'd but fifty six Days, have, at his very Accession, given the Lie so formally, to the Judgments of all those that had preceded him?

Besides, the Case in this Chapter, is quite different from that of our Cause. The Text does not make mention, either of the Impotence of the Husband, or of the Accusation of the Wife; and the Canonists *Immola*, *Johannes Andreas*, and *Butreius*, have assur'd us, for the Honour of that Pope,
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and that Chapter, that it treated of the same, as Chap. *Causam*, of a Marriage contracted, but not consummated, of a Wife, who having made a Vow of Religion, was desirous to be free'd from her Husband, only to execute that pious Engagement.

To which we may add, that that Decretal has been so little heeded, that neither among the Letters of that Pope, collected in the seventh Tome of Councils, nor in the Extract that *Bannius*, in the Annals of the Year 1187, has publish'd, this is not inserted.

The third Conclusion, which is very essential to our System. If, in the Discipline of those Decretals, the Church did condescend to admit of those different Proofs, tho' doubtful and uncertain; she at the same time apply'd the Remedy of provisional Judgments, and Separations conditional, if the Church was deceiv'd, *cum apparet Ecclesiam fuisse deceptam*, the Judgment and Proof were of course annulled.

But since it has been found that the Remedy was much more dangerous and pernicious than the Disease it self, since the Use of provisional Dissolutions has been rejected, the Principles being chang'd, the Consequences must be chang'd too. It
would

would be the greatest Abuse, to found a definitive Judgment in Dissolution of Marriage, upon casual and uncertain Proofs; it would be destroying the Spirit of the Church, and making the Indissolubility of the Sacrament absolutely Arbitrary.

It was believ'd in *France*, after so many Proofs were found defective, that a more real, more positive, and more certain one might be afforded by the Congress. As infamous as this Operation was in all its Circumstances, it was embrac'd, as a Proof which might supply the Uncertainty of all the rest.

It was soon found that this new-invented Proof had nothing superior to the others, except it were more Impudence and Brutality; and in the second Means, we shall see how the Uncertainty and Casualty of an Experiment, so often found defective, has at length caused it to be banish'd from our Tribunals; and how the same Age that saw its Rise, did also see its Abolition.

Such are the Changes which happen'd in the Discipline of this second Time. Such is the Scandal of all these Changes: And we may say, that nothing does more Honour to the Purity and Severity of the first Period, than the Errors, Uncertainties, and Inconveniences of all these Proofs, which the Change of Discipline had introduc'd in the second. But:

But the Church (that vigilant Mother) has had Supplies of Wisdom and Prudence, in all Ages ; she knows how to employ Evil it self for the Good of the Faithful ; and to make Advantage, (if I may say) even, of acknowledg'd Frauds, and confess'd Impostures.

If at one Time, she has thought fit to moderate the Austerity of the ancient Discipline, to accommodate herself to the Weakness of Christian Women, to seek for Modifications, to try different Proofs : Instructed by Experience of the Abuse and Danger of all those Proofs ; she can and may either by resuming primitive Discipline, reject, as scandalous, all Complaints of Impotence ; or, by rectifying the New, reduce those Complaints to certain Principles, and to manifest Proofs.

We may even say, that she has already done it ; when in conforming herself to the wise Regulations of the Parliament, she has banish'd from her Tribunals the impure Proof of the Congress, not only as obscene in its Operation, but also, as uncertain, and fallible in its Success. The Abolition of the Congress, founded upon its Uncertainty, was the Abolition of all the Proofs, which have the same Vice of Uncertainty, because, *Ubi eadem ratio, ibi idem jus ;*

jus; which is what we shall more particularly demonstrate in the second Means.

Second Means, founded upon the Doctrine of our superior Tribunals; which in the Abolition of the Congress, have abolish'd all Sorts of casual and uncertain Proofs.

It is said for *Madam de Gesvres*, that when the Parliament abolish'd the Congress, it did not at all aim at the other Proofs, which were made use of before the Congress. On the contrary, we shall shew, that from the Abolition of the Congress, necessarily follows the Abolition of all the Proofs which are uncertain and fallible, as is the Congress.

If the Dissolution of Marriages is a Scandal in Religion, 'tis a Disorder in Families, and in the State: And the Parliament interests it self in the Honour of Marriages, for the Good of Families, and of the State, as the Church does for that of Religion. 'Tis therefore a common Principle in the Parliament, and in the Church, not to admit of any Cause of Dissolution of Marriage, but upon real, evident, and infallible Proofs.

The Parliament was well acquainted with the Ancient Discipline of the Church in Causes of Impotence; it had seen all the
Changes,

Changes, and all the Inconveniences of the New. As it judg'd those Causes only upon Appeals, it gave way to the Torrent of Custom ; it had even tolerated and followed that of the Congress; but in the midst of all these Customs to which it yielded with Regret, it did not lose Sight of the Rules of the primitive Discipline, so useful to the Good of Families, and the publick Order.

If we attend to what our most worthy Magistrates have said of Parliaments, long before the Abolition of the Congress; we shall find, that their Zeal for the Purity of Manners, for the Honour of Families, and for the publick Good, arose not only against that Abomination of the last Times, and against those obscene Proofs, which were the Preparatives of it: They went to the very Principle, the Fountain-head; and, convinc'd by Experience of the Uncertainty, and Inconveniences of Suits about Impotence, they wish'd they could banish what we may call the very Cause of Action, which they look'd upon to be only a fatal Invention of the Depravity of the last Ages. See the Words of the illustrious Mr. *Bignon*, in the Case of *Cotè* (37 Years before the Abolition of the Congress) *The Depravity of the last Ages having overthrown the Mounds of Modesty*

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defty and Shame, has introduc'd these infamous
Actions, 'till then unknown. And after ha-
ving commended the Discipline of the first
Ages, he goes on thus, To restore this ancient
Severity, and laudable Continence, it would be
necessary to abolish these Actions, as well of Im-
potence, as of Congress, so obscene and shame-
ful, that the publick Modesty cannot suffer
them.

These were the Sentiments of that great
Man ; these were those of the August Par-
liament, animated with the same Spirit.
And can it be believ'd, that Magistrates,
who alike forbad, even Complaints and
Actions of Impotence, design'd, when
they abolish'd the Congress, (which they
did even less for its Obscenity than for its
Uncertainty) to let the other Proofs sub-
sist, which would be as obscene, and as
much or more uncertain than the Con-
gress.

The Congress was thought of only be-
cause the other Proofs had been found doubt-
ful and defective ; and yet they would per-
suade us, that tho' they abolish'd the Con-
gress, which had been receiv'd as the most
certain Proof ; they meant to preserve the
other Proofs, which had been found by Ex-
perience, to be more suspicious, and less
certain. If those other Proofs were cer-
tain, it had been useless to admit of the
Congress :

Congress; and if they were uncertain, it was not then lawful, and it is now yet less lawful to admit of them. There were three Motives that caus'd the Congress to be abolish'd, its Obscenity, its Usefulness, its Inconveniences.

Its Obscenity: For, what could be more infamous, more contrary to the publick Decency, and the Reverence due to the Sacrament, than the Impurity of that Proof, both in its Preparation and Execution?

Its Usefulness: For what could be less certain, and more defective? Will any Body pretend, that a Conjunction, order'd by Judges, between two Persons, imbitter'd by a Law suit, agitated with Hate and Fury against each other, can operate in them, that which in Persons who agree with each other, is produc'd by the Union of Hearts and Wills, which is alone capable of animating that of the Body? Has it not been seen by Experience, that of ten Men, the most vigorous and powerful, hardly one was found, that went out of this shameful Combat with Success? That he who had unjustly suffered the Dissolution of his Marriage, for not having given a Proof of his Capacity in the infamous Congress, had given real and authentick Proofs of it, in a subsequent Marriage? That in a Word, that unworthy Proof, far
from

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from discovering the Truth; did generally only cause Imposture to flourish.

Its Inconveniences : And this is the essential Point. Upon the verbal Process of the Congress, upon the Foundation of so casual a Proof, they used to break the most sacred Bond, they used to annul the most legitimate Marriage, annull'd it irrecoverably, and for ever ; for, as it has been already observ'd, we have not follow'd in this Point, the dangerous Custom of provisional Judgments, and of conditional Dissolutions. Our Maxim, very contrary to that of the Decretals, in these Causes, as well as in others, is, that *res judicata pro veritate habetur*, and which deserves a particular Attention, the same Decree which pronounc'd the Abolition of the Congress, continued this Maxim as to our Matters.

Messire René de Cordoüan, Marquis of *Langey*, had been cast in the Proof of the Congress with Dame *Mary de St. Simon de Courtoimer*, his Wife. By a Decree of the 8th of *February*, 1659, his Marriage is declar'd null ; he is condemn'd to restore the Portion, and all the Profits from the Time of the Celebration, and is prohibited to contract any other Marriage : She is permitted to marry.

The pretended Spinster *de St. Simon*, does in Fact marry with Messire *Peter de Caumont*, Marquis *de Boesse*, and in this Marriage she had three Children.

The Marquis *de Langey* (who the very next Day after the Sentence was given, had protested before Notaries, that he would marry, notwithstanding the Prohibitions contain'd in the Decree) follows her Example: He marries Demoiselle *Diana de Montaut de Navaille*, and becomes the Father of seven Children. Nothing at all was suspected in the Conduct of this second Wife; and if we had receiv'd in our Courts the provisional Dissolutions, and the conditional Judgments of the Decretals, that must have been the Case wherein the Judgment being void of it self, the first Marriage must have been confessed to be legitimately contracted, and the two others declared null, as well that of the *Sieur de Langey*, as that of *Dame de St. Simon*.

The Will of *Dame de St. Simon* sufficiently clear'd the Mystery, the Iniquity of which she endeavour'd to make amends for; she order'd by that Will, *that the Suit which was depending with the Sieur de Langey* (concerning the Restitution of her Portion, and the accounting for the Profits) *should be terminated by Accommodation, by the sole Advice of the Sieur Caillard, Advocate in Parliament, to*
whom

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whom she had declared her Will, which she would have to be exactly executed, without any Body's contravening it under any Pretence whatsoever.

Yet, the Marquis de Langey, having submitted by Letters in Form for a Bill of Review, neither that Will of the Dame de St. Simon, nor the seven Children of the Sieur de Langey, by his second Marriage, were accepted for Arguments of a Bill of Review: His Bill was rejected, and the Parliament could find no other Expedient to repair the Prejudice done to the Sieur de Langey, than to reduce to very little, almost to nothing, the pecuniary Condemnations, which had been pronounc'd against him.

What Inconveniences, what fatal Consequences, from these dangerous and fallible Proofs? A very legitimate Marriage declared null. A Husband, unjustly dishonoured, condemn'd to exorbitant Restitutions: Two Marriages contracted upon the Dissolution of the first; both, according to Purity and Strictness equally unlawfull. The Error, or the Malice, discover'd, *ex post facto*; and nevertheless, by the Authority of the Adjudication, become irreparable. Once again, what Inconveniences, what Horror!

'Tis by these Inconveniences, that the Parliament, convinc'd both of the Useless-
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ness, and Danger of so uncertain a Proof, has for ever banish'd it from our Tribunals.

Therefore, when we examine all the other Interlocutories, ought we not to say, *ubi eadem ratio, ibi idem jus*, where we see the same Uncertainty, and the same Inconveniences, we ought to follow the same Rule.

Tho' the Parliament pronounc'd but upon one of the Sorts of Proofs, because that only was in Dispute, it has judg'd the Principle; in judging one Case, it has made a Rule for all the others; for, as the Law it self tells us, *† quoties lege aliquid unum vel alterum introductum est, bona occasio est, cetera quæ tendunt ad eandem utilitatem, vel interpretatione, vel certe jurisdictione suppleri*: What is against the Law, does not extend; but what is conformable to the Spirit of the Law, does extend, *ad similia*, wherever the Reason of the Law is to be met with.

The Uncertainty of the Proofs proposed by the Decretals, is acknowledg'd by the Decretals themselves: This is what we have demonstrated in the first Means.

The Proofs suggested by the second part of the Reports of the Searchers, have not the

† Lib. 12, 13, 14. ff. de legibus.

the Beauty, but the Vice of Novelty. It was never known in the greatest Remissness of the Discipline, that it came into any one's Thoughts to accept, or even to propose in an Ecclesiastical Court, the scandalous Proof of Erection and Ejection.

This Proof is no more certain than the Congress, and it is undoubtedly much less lawful.

Nothing is more natural, than the first of these two Signs; provided it be excited by an Object capable of such an Effect, or when it is produced by a Vivacity of Fancy.

Nothing, on the contrary, is less natural, or less voluntary, when it is commanded. Four aged Inspectors come to a young Man, as Bearers of an Order of Court; and calling themselves the premier Judges of his Condition, in a Place, and at a Time, fitter to discompose, than animate his Fancy: Could they desire of him a Motion, which their Presence would be more likely to check than raise? And if the Congress, wherein the Presence and Conjunction of the Object may more naturally excite Ability, has so seldom had the Honour of such a Success, how could the *Hequets*, and the *Gayants*, require, that Nature should obey their Command, and pay them a Homage, which
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he owes only to Freedom of Fancy, or to the Prickings of the Flesh?

The Marquis *de Gesvres*, as is natural for a Man of his Age, is sensible of these Signs and Sallies of Nature, *venit injussa Venus*; he neither fears the Number, nor the most scrupulous Exactness of Visits: But let us suppose, that in a first Visit, in a Second, in a Third, a young Man, the best constituted in the World, even, in his Chamber, in his Bed, who should have Tidings brought him of the Arrival of four old Dotards, capable of suppressing that desired Token, that Gift of Fancy and Nature, rather than to provoke it; let us suppose, I say, that this young Man was not so happy as to find Favour in the Eyes of these Searchers, or that they did not find Favour in his, I would fain know what they could honestly conclude or pronounce against him? These Parts of his well form'd in their Consistence, Number, Length, &c. have not produc'd in our Sight, the Tokens, which our Curiosity desired; is he therefore incapable of those Tokens? We have not found him in this Condition; does it therefore follow, he never can be in it? We have not seen him *erectum*; is he therefore *inerigible*? We have seen the Causes of Ability, but not the Effects; is he therefore unable; and must his Marriage be dissolv'd? Is it possible for any-

any-body to argue in that Manner? Will any Judge be found so hardy, as to build upon such a Negative, a Judgment of Dissolution?

Let us say therefore, that this Proof of the two Tokens, is neither more sure, or less defective than the Congress; but let us further say, that it is less lawful, and (under permission) more criminal than the Congress. All that passes in the Congress, is at least the Effect of a lawful Embracing, between a Wife and a Husband; but how can People dare to maintain, that it is lawful, out of the Action of Marriage, either to the Party to use Friction himself, or to the Searchers to provoke him to it?

And indeed, to speak here only of the first Sign (without stretching our Thoughts to the filthiness of the second) this first Sign must be either natural or procured.

The natural depends upon a Caprice of the Fancy, which the Will has no Command over.

The procured, out of the Action of Marriage, is a Crime; and, upon any other Occasion, there can be no exciting it, or even consenting to it, without sinning.

The Council of *Trent*, after *St. Paul*, looks upon these Risings of the Flesh, these Disorders of the Imagination, as a Sin, when the Consent goes along with them, or when

strenuous

strenuous and hearty Endeavours are not made use of to suppress them.

It is therefore true to say, that the Congress is only shameful, but not criminal; but that these Tokens, desired by the Searchers, are at the same time infamously shameful and criminal.

And yet, People give themselves the Liberty of declaiming in the Sanctuary of the Tribunal, and publishing in Writings, *that the Searchers have Secrets for exciting Motion, Spurs to prick the Sensibility: That these Excitements are no Crimes, when they are made use of for the better Information of the Church, and enable her to decide the Doom of a great Sacrament.*

What, are these pretended Secrets reserv'd to Men of Art? It may be said, they are the Ideas of an Orator, who wantons in his Declamations. But, what are those pretended Excitements, that are said to be lawful? It may be said that they are Blasphemies. When *St. Thomas* said that those Movements are no otherwise Crimes, than *in quantum ex luxuria procedunt*; he meant that they are not criminal, when they proceed from an involuntary Impetuosity of Nature; but that they are Innocent, when they are deliberated and excited with any View, or for any End whatever, this will not be found, either in *St. Thomas*, or

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any where else. He never said, that the Intention, the End, the Interest, and Necessity, for which a Sin is committed, hinders or wipes away the Sin.

The Inspection of *Madam de Gesvres*, demanded by herself, and propos'd by her two Searchers, is it a Proof any more to be admitted?

Let the Inspection be ever so contrary to Christian Modesty, *Madam de Gesvres* flatly declares, such a Scruple does not make her uneasy ; let † Denudation, baring herself to several Witnesses ; let the Touch of several Hands be ever so shocking to Decency, Civility, and good Manners, *Madam de Gesvres* calls all this, common Topicks, a worn-out Veil. Further, if you will believe her, the Dignity of the Sacrament is mightily beholden to her, for the Sacrifice she is desirous to make to it, of her Modesty. We are, adds she, at a Bar, where Modesty always gives way to Truth.

Well, so be it ; we'll say no more of Modesty, since *Madam de Gesvres* looks upon such Discourse, as a moralizing Sermon, which does not affect her : But then, don't let her offer to us the Contempt of her Modesty, for a Proof of the Truth. The
greater

† These are *Madam de Gesvres* Words in her Replication.

greater Boldness there is, in thus exposing so freely her Person, the more suspicious it is, and will be much more so, when in the second Part, we shew the particular Circumstances, wherein it will appear, that she who makes so little Account of Modesty, does not make over much of Truth.

Let us now examine the Thesis in general : Is Inspection of the Wife a lawful, certain, evident Proof of the Husband's Sufficiency, or Insufficiency?

The Question is not, in what Order to place this pretended Proof; whether it is to be kept to the last, or whether it shall be made use of previous to all others.

This Order of Proofs, is a System of the Brain, contriv'd with a great deal of Cunning : But this System, which has its Inconveniences, is not easily reconcileable with the Rules; for either all those Proofs, which are to be made use of in successive Order, are certain and evident of themselves, or they are not so : If they are certain and evident of themselves, any one of them is sufficient, without trying the rest : But if they are not so, not any one of them ought to be admitted; since one, two, three, four Kinds of uncertain Proofs, cannot make up one certain one; nor are they, properly speaking, any Proofs at all, especially in a Thing where the Condi-

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tion of a Sacrament being concerned, no Judge can decide thereof, but by manifest and infallible Proof.

Inspection of the Wife (as hath been shewn) was never order'd in the Canons, or Decretals, for determining the Sufficiency or Insufficiency of a Husband. The Advocates of *Madam de Gesvres*, who are so liberal as to allow 1500 Years to the Antiquity of this Proof, have not been able to give any Example of it. The Inspections of young unmarried Women, accused of having violated their Vow of Virginity, even those of Wives, who had made a Vow of it, and to accomplish it, touch'd with Remorse of Conscience, sought to free themselves from Marriage, and who affirmed that they were Virgins, in order to retire to a religious Life, are not Examples to be propos'd; the only one which they thought they had met with in Chap. *Proposuiſti*, is foreign to our Case; and if it were to be understood as they would have it, it would either falsify, or be falsify'd by all the rest.

If, since the Decretals, but before the Abolition of the Congress, the Visitation of the Wife has been practis'd, either as a Preliminary to the Congress, for examining into the Person of the Wife, whether she did not bear in her own self some Ob-

stacle:

stacle to the Consummation ; or as a Preamble, which the Husband himself demanded, it is very certain, that this Visitation of the Wife, was never admitted as a Proof, either of the Sufficiency, or Insufficiency of the Husband.

It was not at all admitted as a Proof of Sufficiency ; on the contrary, the Decrees, and especially that of *Langey*, have declared that it was no Proof thereof.

The pretended Lady *de St. Simon* was inspected, as well as the *Sieur de Langey*, her Husband. The Searchers had declar'd in their Report that they had found both of them in a Condition that Man and Wife ought to be in ; the Wife, she talked in the same Style and Tone with *Madam de Gesvres*, that if she ceas'd to have the Appearance of a Virgin, it was occasion'd by the brutal Attempts of *an Impotent*, and by the Strugglings of a Love equally *steril and furious*, which tried every manner of Way to satisfy itself. The Visitation was of no Use to the *Sieur de Langey* ; 'twas adjudg'd, that the Condition his Wife appear'd to be in, was no Proof of his Capacity ; so the Congress was order'd ; this same Husband, (who carried the Point, in all outward Appearance, in the aforesaid Inspection of his Wife,) was cast himself in the Proof of his own Person : The Congress decided it against him,

C 3

him, notwithstanding the Visitation, and his Marriage was made void by a Decree.

It is therefore adjudged, that the Inspection of the Wife is not a Proof of Sufficiency in Favour of the Husband.

It is likewise adjudged, that it is no Proof of Insufficiency, in Favour of the Wife; for if the Inspection of the Wife, was capable of deciding it, there had been no Occasion of proceeding from the Visitation to the Congress. All the Judgments, which have order'd the Congress, are therefore so many Prejudications, that Inspection was not any Proof, either *pro* or *con*.

It had been very unjust, that the Wife should have carry'd the Cause by the Inspection, because she might have had a Secret, to have look'd like a Virgin; and that the Husband should have lost it, tho', by the Inspection, his Wife had not had the Appearances of a Virgin. The Condition would have been in no wise equal; all the Advantage would have been on the Side of the Wife, and all the Hazard on that of the Husband: For if the Wife appear'd to the Eyes and Fingers of the Matrons and Surgeons, *integra & intacta*, she would from thence conclude, that she is a Virgin, and her Husband Impotent; and if on the contrary, she did not appear a
Virgin,

Virgin, she would come off, with saying as the Lady *Langey* did, and as *Madam de Gesvres* in her Memorials already seems prepared to say, namely, that it was occasion'd by the Attempts of an Impotent Husband, and the Strugglings of a Love equally sterile and furious. Let us therefore talk according to the Rules, and say, that the same Uncertainty, which allows not the Inspection of the Wife, to be a Proof for the Husband against her, does not any more allow it to be a Proof for her against her Husband.

An Uncertainty, founded, not only upon the Frauds and Juggles that may be play'd, but even upon the Institution of Nature, independantly of all Fraud.

How many known Examples are there, and how many unknown, of Tricks used on these Occasions; artificial Maidenheads, *factitia Virginitatis*, Virginities made by the Apothecaries. Authors, Physicians and Canonists are full of them; 'twill be enough to remind you of two or three of them.

The first, reported by *Hostiensis*, of a Lady, nam'd *Casatella*, *quæ instrumentum suum adeò coarctavit, quod & viro & omnibus aliis inhabilis fuit facta*: So that all the Art of the Physicians could find no Remedy for it.

Another is attested by *Ambrose Perreius*, of a Woman, who after having lain in of a first Child, so shrunk up her Parts, by Astringents, during the Time she went with a second Child, that she could not be brought to Bed of it, without being cut.

Two others, one of which is certify'd by *Riolanus de visu*, of a Woman that was fall'n in Labour, that was so streight, that the Point of a Lancet was not able to penetrate; and another, reported by *Henry Minikin*, of a young Wench, who was big with Child, and the Capacity of those Parts could hardly receive a Pea.

* *Zachias* is so persuaded of the Truth of Astringents, that he does not scruple to say, that by this Stratagem, the most abandon'd, most debauch'd Strumpet, may give herself all the apparent Merit of a Virginity.

This is also one of the Reasons, which made *Pontius* say, in his learned Treatise of Marriage, *Lib. VII. ch. 66. numb. 7.* that *fallax est inspectio an virgo sit*; from whence he concludes, *numb. 8.* in these Words, very remarkable for us, *Si Mulier asserat se incognitam, Vir autem affirmat & aliàs non sint aliæ probationes convincentes, credendum est viri*

* Facile est per medicamenta adeò genitalia feminea restringi posse, ut corruptissimum & subagitatissimum scortum virginem pro se ferat.

viri juramento juxta, Cap. Si quis; & Cap. I. De frigidis, Neque obstat, quamvis mulier exhibeat se inspiciendam & incorrupta appareat, cum ea inspectio fallax omnino sit, ac famina possit in odium viri facile se virginem ementiri.

But let us away with these Suspicions of Fraud, and suppose (yet without believing it) that * a young Lady, train'd up in a School of Piety, imbu'd with the Principles of Religion, &c. is not capable of practising such Arts, and of preparing such an Operation for the six Months † leisure Time, which she had, when she was absent so long from her Husband. The same Doctor and all the rest assure us, that even, according to the Institution of Nature, the Inspection of the Wife makes no Degree of Proof.

The Physicians, the Canonists, hold for a Rule, that in Nature, there is no certain Sign of Virginitie; that some are Virgins;

C 5

and

* These are the very Words of the printed Plea.

† Madam de Gesvres is so well acquainted with the Use and Effect of Astringents, that in the second Interrogatory, which she has caused to be put to her Husband, Art. I, II, III. she ascribes (in very learned, tho' very false Terms) the supposed Impotence she accuses him of, to the astringent Medicines, which she says had been apply'd to her Husband; in a Distemper he had when he was a Child.

and yet don't appear so, while others may appear so, and yet are not so.

Among the Physicians, there is not any one (unless it be *Pineius*, who, 'tis said, retracted his Opinion afterwards) but affirms that Visitation is an unprofitable Method of proving Virginity; and that after a certain Age, there ceases to be any certain Sign, by which to distinguish a Virgin from one that is not so.

|| *Zachias*, after having problematically treated the Question, concludes with these Words, *Verum his non obstantibus, prima conclusio hæc sit, virginittis nullæ dantur certæ & indubitabiles notæ*; and he adds, that this is the Opinion of all the Moderns; he cites a Multitude of others, as you may see at the Bottom of the Page.

* *Du Laurent*, a famous Anatomist, treating of the *Hymen* and Tokens of Virginity, affirms that he is convinc'd by an infinite Number of Experiments, that there is no such Membrane as the *Hymen* is describ'd to be; that if there be any such Membrane, it is not in the Institution of Nature; that therefore we must look out for other Tokens of Virginity,

|| *Lib. 4. tit. 2. quest. 1. num. 14.* Toubert, Paré, Augenius, Fortunatus fidelis, Condrochius, Nancelius, Vlains, Vallesius, Vincentius, Alfarius, and several others, says he.

* *Lib. 7. quest. 13. pag. 356.*

Virginity, and that he knows not of any such.

† We may likewise consult upon this Head the other Anatomists, Surgeons and Physicians, whose Names are underwritten. And it is so universal a Truth in Physick, that it is given for a manifest Conclusion in publick Theſes, *nulla dantur virginittis ſigna.*

The Canonists likewise are convinced of this Truth; *Hæſtiensis* in his *Summa*, fol. 83. *Edit. Ven.* and the other whose Names are below.

Even the Decretals have expreſſy declar'd it, *nam oculus & manus obſetricum ſæpe falluntur.*

In ſhort, the moſt celebrated Theologiſts and Caſuiſts have given us their Deciſion of it.

St. *Ambroſe* affirms, that it was the Opinion of the ableſt Phyſicians and Surgeons of his Time: *Ipi archiatri dicunt non ſatis liquido comprehendendi inſpectionis fidem, & ipſi in medicina vetuſtis Doctoribus, id ſententiæ fuiſſe.*

Pontius, before cited, lays it down as a Principle, and from thence concludes, that the Inſpection is of no Uſe; *quamvis per inſpectionem*

† Oribasius, Soranus, Fernel, du Laurent, Bartholomée, Eufachius, de Graaf, Riolanus, Plempius, Fabricius, Henry Minikin, Verheyen, Lanus, Dionis, Mauriceaux, and de Vaux.

60 The PLEADINGS for

inspectionem incorrupta appareat ; quia hæc inspectio omnino fallax est.

Commitolus, one of the most approv'd Casuists ; *inspectio virginis vana est, & turpis, futilis & vana, quia qui eam adjicit, putat dari certa signa virginitatis, cum ea non dari superioribus annis, in frequenti cætu Medicorum & Philosophorum Academiæ Patavinæ,, persubtili inter eos doctores habitâ disputationes constitutum sit — Turpis, quia totius familiæ nomen, & splendor fœdaretur.*

Monf. de St. Beuve, who was very well skill'd in Matters of Morality, and has writ concerning it with very good Success, says thus : *What I speak of the Inspection of the Wife, and of the Congress, [he writ before the Abolition, in 1677.] it is my Opinion, wherein I am so well grounded, that I don't think that it is in a Judge's Power to be present at the Encounter, and to support, upon two Methods, as uncertain, as they are shameful and scandalous, a Judgment, to declare a Marriage nul. There is no judging by inspecting the Wife, whether the Marriage was consummated or no.*

If Inspection of the Wife be uncertain, both from Nature, and from the Sagacity of Art itself ; if (to make use of Madam de Gesures's Advocates own Comparifon) we wander and go astray in this Path which leads to the Hamlet ; it must be concluded, that

that it is no Proof to be admitted, and that it is buried with the Congress.

To what Proof, therefore, is *Madam de Gesvres* reduc'd? to that which is made use of against herself. To have prov'd her Husband insufficient, there ought to have been found in his Person a real and visible Defect, in short, Defect in Conformation; whereas the Searchers unanimously own it to be a very good Conformation, and describe it accordingly.

Madam de Gesvres's Advocates may refine as much as they please, upon occult *Impotencies*, internal *Incapacities*; all that is but Froth; conjectural Proofs are not us'd to be admitted here. Let them say, that the *Husbands* whom the *Wives* complain'd of in the *Decretals*, were not wanting in Conformation; that those, who were oblig'd to undergo the Congress, were well conform'd; we will battle them with their own Argument.

The *Husbands*, mention'd in some of the *Decretals*, had a good Conformation; and yet their Marriages were dissolv'd upon other Proofs, it is true; but on t'other Side, how often has the Church herself confess'd she was deceiv'd, by not sticking to good Conformation, but giving into other casual and uncertain Proofs?

Those

Those who underwent the Congress, had a manly Conformation, and yet that was judg'd not enough, and another Proof was exacted from them, it is true; and herein consisted the Abuse which the Parliament acknowledg'd, and which is at length abolish'd by their Order.

Conformation is a Proof, that has its Foundation in Nature itself.

A Child is born with all the Parts of a well organiz'd Body; Nature, who animates all those Parts, assigns each its proper Function; all those Parts, born together, take likewise their Growth or Diminution together; they increase together in Youth; they are at a Stay together in Manhood; they lessen together in old Age: It cannot therefore be said, without dishonouring the Wisdom of Nature; that having form'd all those living Parts at one and the same Time, with Proportion, Consistency, and Disposition, necessary to their several Destinations; she did not at the same time give to each the suitable Nourishment and Strength for fulfilling the Designs of Nature's self.

We except out of this Rule, the Accidents which befall the human Body, and which may put out of Order the best conform'd: But supposing, according to our System, a good Conformation of Parts, with a
laudable

laudable Habit of Body, that is, a sound, whole Body; we may say, that this Man is a perfect Man, capable of all natural Operations.

Upon this Principle, every Man is reputed able, in like Manner as every Man is presum'd sound of Body, if the contrary does not appear by some real, visible, and manifest Defect, because *præsumitur in qualibet causâ id quod frequenter accidere solet*; and as the Gloss upon Chap. *Si quis*, says, *vix aliquis invenitur impotens ad coeundum*.

The Person accusing, is to prove the Accusation, not by Conjectures, but as the last Law, *Cod. de probat.* says, *apertissimis documentis, vel indiciis ad probationem indubitatis & luce clarioribus*. You accuse me of Impotency, against Presumption of Law and Nature; it therefore lies upon you to prove it; and this you cannot do, but by some real, evident, and manifest Defect in my Conformation.

There are in Fact, no surer Rules to go by, in judging of natural Things, than those of Nature's Self. But let us suppose for a Moment, that even this Principle may be sometimes dubious, that there may be inward Feeblenesses, secret Defects, some Incapacity within, which frustrates the Capacity without; what Proof ought to be made of this? Will any go about to
prove

prove an obscure Thing, by a Proof yet more obscure; and expose a-new, the Sacrament, to the Danger of those Uncertainties, which the Order of Parliament has banish'd with the Congress? Two Rules are enough to settle all the Scruples upon this Head.

The first, of two Sorts of Proofs which may be obscure, that which is most natural, and most commonly sure, is preferable; therefore, good Conformation, which is a Proof perfectly natural, and generally, if not always, sure, is doubtless preferable, both to the Inspection, and all those other Proofs, which in all Times have been found to be uncertain and defective.

The second, drawn from the Decretals themselves, and from their Gloss, and which alone can form a Decision, *viz.* Of two contrary Proofs, that which tends to keep the Marriage in Force, *pro matrimonio*, ought to prevail over that which is, *contra matrimonium*, and which tends to vacate it.

If these two Rules do not satisfy; if 'tis reply'd, that thereby the Marriage of an Impotent, may chance to be confirm'd, and that it is exposing a Wife, for her whole Life, to the most dismal of all Conditions, the Objection may be very easily and much more justly retorted. If we revive the forbidden Practice of casual Proofs,

we run a much greater Hazard of dissolving, as formerly, many legitimate Marriages, and of frequently violating, by conjectural Proofs, the Indissolubility of the Sacrament. Can any one hesitate between these two Inconveniences? But the third Rule, already cited, and taken from the Text of those Decretals, gives a finishing Stroke. *Tolerabilius est aliquos contra statuta hominum dimittere copulatos, quàm contra statuta divina legitimè conjunctos separare.*

And by thus rejecting all these defective Proofs, we are so far from doing a Thing contrary to the Laws, *contra statuta hominum*, that on the contrary, the Civil Law concurs herein with that of *Jesus Christ*, for maintaining the State of Wedlock.

Such is the wholesome Effect of the Regulation of 1677.* The Officials, well appriz'd of the Wisdom of its Motives, well convinc'd that the other Proofs, no less obscure and uncertain than the Congress, were abolish'd with it, have made no Scruple, as to the Spirit and Extent of the Law. The Physicians, and Surgeons of greatest Note, who have made Inspections and Reports in this Court, particularly, since the Proscription of the Congress, have given

* In that Year, the Congress was abolish'd in France.

given sufficiently to understand, by their Reports, that since the Time of that Regulation, they have no longer any other Tokens to examine, any other Proofs to look for, than good or evil Conformation.

Some of these sage Searchers have prided themselves in declaring in their Reports; *that it was the sole Thing (since the Condemnation of the Congress) which they were permitted to examine.* Others, without repeating the same Reason, have intimated the same Submission to the Regulation, by confining themselves in their Reports, to the sole *Examen* of good or evil Conformation. Upon this single Proof, without carrying their Curiosity further, they have determin'd whether a Man was insufficient or not; and 'tis apparent from several Examples, that the Officials have requir'd no other Proofs for pronouncing their Decision.

If the Inspectors, who were appointed in this Cause, had imitated the Prudence of those who preceded them; if they had taken care not to have gone out of the Bounds of their Competency; if they had had the same Deference and Respect, which their Elders had for a Regulation, which was too publick to be unknown; they would have held to the former Part of their Report, which, being clear, precise, and positive,

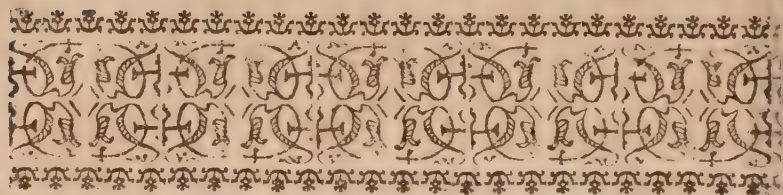
sitive, had been of itself enough to have decided the Thing; and had forborn giving (by the second Part) Occasion of Declamation to the Parties, and Scandal to the Publick.

We produce four Reports, and so many Sentences, which have follow'd, to prove this Custom; those of *Dubut*, in 1675; *le Paye*, 1684; *Royer*, 1694; *D'amour*, 1703.

We likewise produce other Reports, in the same Form, on which we find no Judgment at all; which makes it be presum'd, that the Parties abided by the Veracity of the Reports concerning simple Conformation. In none of these Reports, in none of these Judgments, do we find, either the Searchers proposing to inspect the Wife, or the Officials ordering it.

In the Business of *Cabu*, try'd at *Blois*; in that of *le Gross*, try'd at *Rheims*, and follow'd by a Decree reported in the *Journal du Palais*, the Women were not visited.

We shall now more particularly examine this second Part of the Reports, in explaining the particular Circumstances.



P A R T II.

Wherein is confirmed by particular Circumstances what was laid down in the first Part by general Principles ; and, at the same Time, Answer is made to Objections.

THE particular Circumstances are taken from the two Reports of the Searchers, and from the Interrogatories; and as each Party takes its Arguments from these two Sorts of Acts, the Observations which shall be made on those two Acts, will serve at once to confirm the Measures of the Marquis, and to answer the contrary Objections.

Observations on the Searchers Reports.

The first Part of the Reports is clear : The Searchers unanimously attest a good Conformation, and that's enough.

When

When the Advocate of Madam *de Gesvres* is pleas'd to say *Configuration* instead of *Conformation*, 'tis a Quibble which ought not to be admitted. *Configuration* is laid of the Works of Art; *Conformation* is understood of the Works of Nature: 'tis the very Word us'd in Phyfic and Surgery, which have the human Body for their Object.

In the second Part of the Reports, the Searchers raise Doubts; but their Doubts ought not to detain the Judges.

When the Searchers Scruple fails upon a Fact within their Jurisdiction and Commission, the Judges may scruple along with them; but when their Scruples relate to a Fact beyond their Commission, the Judge makes a Distinction, and goes on with his Decisions.

The Searchers, 'tis true, are not bare Witnesses; but neither are they Judges; theirs is a third Function partaking of both; they are above a Witness, so far forth, as in examining a Fact, they give their Opinion on the Fact they have seen; but the Judge is above them, in that they derive all their Power from him, in that they cannot pronounce their Opinion, but upon what Fact the Judge marks out to 'em, and in that the Judge is sway'd by no more of their Opinion than what he thinks consen-
taneous

taneous both to the Letter of their Commission, and to the Rules of Justice.

From these Maxims, founded upon Ordinances, it follows,

1. That after the Searchers have examin'd the Body of the Marquis *de Gesvres*, and agreed that he's well conform'd, it was not in their Power to go further, and say, *that those Conditions are not sufficient*. It belong'd to them to relate the Conditions they had seen; but the Judge was to decide, *whether those Conditions are sufficient or not*. The Existence and Description of those Conditions regard a Question of Fact, and that is all was refer'd to them; the Sufficiency or Insufficiency of those Conditions concern a Question of Right, and that is what's reserv'd to the Judges.

2. They were order'd to examine the Body of the Marquis *de Gesvres*. Madam *de Gesvres* had exhibited against him, that his Body was defective by reason of a Distemper in his Infancy, and the Medicines apply'd thereunto. The Truth or Falsity of this was the Object of their Inspection, and they ought to have rested there.

They were not commission'd to observe in the Marquis's Person the Effect or Absence of the two other Signs.

The

3. The Scruple of the Searchers is the more to be rejected, because it tends to the clearing up a Thing which was not desir'd of them by the Official, and which he was very far from ordering, because of the Impurity thereof; for, in good earnest, (whatever Subtilties are made Use of by the other Side) to what Purpose do two of the Searchers say, That those two Tokens having not appear'd to them, they cannot absolutely decide concerning his Capacity, but only to lead on the Judges to new Explications upon both those Tokens? To what Purpose do the other two say, *that they are of Opinion, in order to pass a Decision, that there should appear in him some Tokens of the first Faculty; and that even those Tokens of the first Faculty wou'd not be sufficient, but only to give the Judges to understand, that it was the Absence of the second Sign which form'd their Doubts, as well as that of the first.*

The Doubt of the Searchers therefore tends to an Explication, equally impracticable in Law, upon both of those Tokens.

For, as to the second, *Madam de Gesvres's Advocates themselves declare, that it were a Proof worthy of Thunder from Heaven, a Proof as damnable as the Sin of Onan.*

And

And as for the first, it is, as I've said before, either Natural or Provok'd.

The Natural depends upon the Capriciousness of Fancy, and how cou'd it be thought, that the Judge wou'd go about to exact at such a certain Moment of Time, in such a Place, in the Presence of such and such People, a Motion, which even the most vigorous Men cannot command at Pleasure.

The Provok'd, either by the Person himself, or by another's Hand, is a Sin, whatever the Advocate of *Madam de Gesvres* may think of it. And how could it be imagin'd, that a Judge should require such a Proof by committing a Sin?

4. In vain does the Advocate of *Madam de Gesvres* endeavour to justify the Searchers as to the Curiosity of the second Sign, by saying that they only spoke of it *per modum docendi*, thence to conclude the Necessity of a Visit from the Want of that second Sign.

This Excuse is groundless; for in the Report of the Sieurs *Gayant* and *Marechal*, they don't speak at all of Inspection; they say barely they stand in Need of two Tokens, which did not appear to them; and (as shall be seen by and by) they could not without Absurdity propose the Inspection as a Supplement of those two Tokens.

The Excuse is no better, as to the Report of the Sieurs *Hequet* and *Chevalier*. It is true, after having said, that as the former Token would not be certain as to Consummation, they think it fitting that *Madam de Gesvres's* Body should be inspected. And herein their Complaisance makes them guilty of two inexcusable Faults.

The one, that they thereby intimate, (though not in express Words) that they ground their Doubts upon the Absence of the second Sign, as well as the first; for if that second Sign had appear'd to them, together with the first, they could not, without Absurdity, conclude upon inspecting *Madam de Gesvres*.

The other: When they desire to have *Madam de Gesvres* visited, is it to look for the Proof of the first? But they themselves say, that that first Sign, tho' it did appear, were not enough. Is it to look for the Proof of the second? That were an Absurdity. There never remains any Foot-steps of that second Sign; and if there had been certain Traces, it would only have been of the first.

5. We dwell too long upon such Stuff; we will only add two Reflexions.

And first: The Observations made by the Searchers concerning the Absence of the two Signs, are all relating to Consumma-
D tion:

tion: *But as these Conditions* (of good Conformation) *are not sufficient to judge of Consummation*, say the Sieurs Gayant and Marechal; *and because these Tokens of Erection would not be any more certain with Respect to Consummation*, say the Sieurs Hequet and Chevalier. Now, these Searchers were not commission'd to examine whether the Marriage was consummated or not; nay, this was so far from being the Business of their Commission, that to speak according to the Rules, it is not the Business of the very Cause, as shall more at large be explain'd hereafter.

Secondly, The Congress is abolish'd; and yet what these Searchers desire, is an Opportunity either to revive the Congress, or to introduce a new Kind of Proof, more unlawful, and consequently more impracticable than the Congress. The two Signs are never allowable but in the Action of Marriage; out of the nuptial Conjunction-State, it is criminal to excite them; therefore it is true to say, that the Idea of the Searchers tends to the Congress, or to a Proof worse than the Congress it self.

What therefore is the Right and Duty of a Magistrate on this Occasion? To separate in these Reports what is the Object of the Searchers, from what is not; what is sufficient, from what is superfluous; what

is regular, conformable to Purity of Discipline, and the Intention of the Regulation, from what is irregular, contrary to Religion, and manifestly tends to elude the
* Regulation.

Had the Searchers stuck to the first Part of their Reports, and gone no farther, it must be confess'd it had suffic'd; it was clear, it is explicite, it leaves no Doubt. 'Twas enough that the Searchers saw in Monsieur *de Gesvres* no Want of Conformation, no Obstacle to the conjugal Duty; in a Word, no Mark of Insufficiency. If they were pleas'd to go farther, to add a second Part to their Report, to desire Conditions which they did not see, that was beyond their Business; they were commission'd to examine the Signs of Insufficiency, if there were any such, and not look for Signs of Sufficiency, which the Judge did not direct 'em to do. Instead of finding any Defect, any Token of Impotency, they found him well conform'd. There their Function is fulfill'd. The second Part must be cut off, as vicious and superfluous, *vitiatur & non vitiat*.

Monsieur *de Gesvres*, we are told, is not accus'd by his Wife of Insufficiency, but Frigidity; the Searchers have found him in an actual State of Frigidity, and for that

D 2

Reason

* He means the Regulation of 1677 abolishing the Congress.

Reason have desir'd at least the first Sign; and as on one Side that first Sign would be yet but a Presumption, and on the other the second would be impracticable, they have conducted the Judges, by their Way of Reasoning, to the Inspection of the Wife.

Answ. Madam de Gesvres's Advocate sure must not have read her Brief, or has forgot the Tenour of it; her Action is expressly for Impotency; there's not the least Word of Frigidity. She is so hardy as to advance, that the Duke of Tremes had Knowledge of this suppos'd Impotency before his Son was marry'd; she ascribes it to a Distemper in his Infancy, and to some Medicaments then apply'd thereto; the Interrogatories which she exhibits to him, the Sentence which orders the Inspection, all turn upon a formal Accusation of Impotency.

The Objection therefore being untrue in Fact, and the Searchers Report being relative to the Interrogatories, it was a real and apparent Impotency they had to search; and consequently having found a faultless Conformation, they had nothing to do with any Thing else.

Neither is the Objection juster in Law; 'tis a Sophism to pretend, that the Word *Frigiditas* signifies only a Privation of Motion.

Under

Under the Title *de frigidis & maleficiatis*, the Compiler of the Decretals has comprehended all the Kinds of Impotency, whether natural or accidental; whether that which is owing to some foreign Cause, or that which is occasion'd by an ill Conformation; and for this Reason *Antonius Augustinus* added to the Title *de frigidis & maleficiatis* these Words, *Seu impotentia coeundi*, as Terms really synonymous. The Roman Correctors, and M. Pitbou, have made the same Addition.

All the Canonists and Theologists reject this chimerical Distinction of *Frigidity* and *Impotency*.

* *Frigiditas* (say St. Thomas and Cardinal Cajetan) *ex defectu naturæ incurabilis dirimit.*

Soto, a Theologist of the Council of Trent, † *Nomine frigiditatis omnis impotentia quæ à naturâ competit, intelligitur, non accidentaria quæ transit, sed complexionis naturalis.*

Navarre says, after (St. Thomas and St. Antonine,) || *Ad impedimentum frigiditatis reducitur omnis naturæ defectus.*

D 3

* The

* Tertia parte, p. 58. Art. 1.

† In 4 Dist. 34. q. 1. Art. 2.

|| Tom. de Sacr. c. 22. num. 154.

* The Canonists and Theologists own no other absolute and perpetual Impotency, but that which proceeds from a Defect of Nature, or which is occasion'd by some Accident, both equally incompatible with a good Conformation.

† But, say the other Side, the Searchers saw not in the Marquis *de Gesvres* the Tokens they desire with a good Conformation; || therefore they have seen him in a Condition of Frigidity.

This pleasant Sophism is wrong plac'd; it is ridiculous to say, that not to be actually in that Condition, is to be frigid.

Impotency, Frigidity: The Words are indifferent; the Question now is not about the Name, but the Proof; and Madam *de Gesvres* not having been able to find any Thing in Conformation, but what makes for her Husband, she ought to own, that she is destitute of Proof, and that all the Proof is against her.

* *Silvest. v. matr. quest. 16. cb. 18. S. Bonav. in 4 Dist. 34. Art. 2. q. 1.*

† *Basile Ponce, lib. 7. c. 60.*

|| *Conink, disp. 31. de imped. matr. lib. 6, 7.*

Observations upon the Interrogatories.

Madam de Gesvres exhibits a great many Interrogatories to her Husband; which in Substance are, That since their Marriage, which was solemniz'd in June 1709, 'till March 1712, when she left him; except such Times when he was absent, either in the Army or at Court, he has almost always lain with her, and in the same Bed; that he has continually try'd his utmost Endeavours to consummate the Marriage, but without Effect. Thence she infers he is impotent; and, to prove it, desires that she may be inspected. She reasons thus: You have us'd your Endeavours upon me to no Purpose; therefore you are impotent: No Judgment can be made of your Condition by inspecting your Body, since the same Searchers who found ye well conform'd, have declar'd that is not enough. You shall therefore be judg'd by my Body, because I shall be found to be a Virgin. You have affirm'd, that you have consummated Marriage with me, and I carry about me the Proof of the contrary; to refuse this Proof, is to fear a Detection; and to fear a Detection, is owning a Guilt.

This is certainly the Argument of Madam de Gesvres, stated in its full Force;

nor can we be reproach'd with weakening it in the least.

The Marquis *de Gesvres* may easily say; that, strictly speaking, this is not the Point in Question; that from Failure of Consummation to Want of Power, is no necessary nor conclusive Argument; that tho' it were true, and that it was an Axiom, *ab actu ad posse valet consequentia*, the Proposition is not convertible; and that it is on the contrary true, *à non actu ad non posse non valet consequentia*; that the Wife's Virginity would only prove the Marriage unconsummated; not that it could not, or cannot be consummated; that a Nullity of Marriage cannot be pronounc'd against a Husband for not performing his Duty; but that it is must be prov'd from a real Defect in his Person, by an incontestible Proof, that he is absolutely, indubitably, and irreparably unable to perform it.

All these Answers might be reasonably given; nay, they would be sufficient Answers; but the Marquis *de Gesvres* is not reduc'd to that Defence; and the Objections of Madam *de Gesvres* shall be not only confuted, but retorted upon her.

Madam *de Gesvres* agrees, nay, makes it Part of her Bill, that the Marquis (except as to Absences) has continually lain with her;

her, and in the same Bed. This is one Argument she furnishes against herself.

* The Marquis de *Gesvres* has affirm'd, in a judiciary Manner, that he has accomplish'd his Marriage; nay, several times accomplish'd it; and this is a second Proof which she has rais'd up against herself.

Now, against this two-fold Proof, what does Madam de *Gesvres* say? Would the inspecting her Person be a certain and credible Proof? Are we to take her Word who proposes it? And in this Case, is not Daringness the Mask of Falshood? This shall be explain'd; and it shall be seen, that where there's so much Hardiness, there's but little Truth.

Nocturnal Cohabitation, *Condormition*, is a first Proof of Consummation. 'Tis a Maxim which the Advocate of Madam de *Gesvres* takes Care himself to establish; and we can't do better than employ against him the same Authorities, which he thought he had lit upon against us.

Zachias reports these Words of the Decision 48 of the *Rota*, Num. 4. *Quod conjuges incubuerint operi nuptiali satis probatur, si constet conjuges habitasse in eodem lecto.*

From thence the Advocate of Madam de *Gesvres* ingeniously concludes, that *habitasse in eodem lecto*, is a Proof, either that the marry'd Couple have consummated,

or have apply'd themselves to consummate.

But without refining upon Words; *incubuisse operi nuptiali* does not barely signify *conatum*, it signifies the very Act; and that's the natural and literal Sense.

And indeed, among all the Proofs which make Consummation be presum'd, the Doctors declare, that the Proof *ex concubitu in uno eodemque lecto*, is the strongest, *neque præsumptio, sed plena probatio*, because there can be no real Proof of Non-Consummation.

The learned *Soto*, a Theologist of the Council of *Trent*, says positively, it is impossible to prove, that a marry'd Couple, who have so lain together in the same Bed, have not consummated: *Quòd si in eodem thoro manserunt ut conjuges, negativa pars probari neutiquam potest.*

The Advocate of *Madam de Gesvres* refines upon the Doctors, and upon the *Rota*. He quotes a formal Text of Chap. *Litteræ de præsumpt.* wherein the Pope decides, that a certain Husband's Kinsman being found in Bed with his Wife, *solus cum sola, nudus cum nuda*, it was no less than Adultery; and no other Proof was requir'd in order to pronounce a Divorce. This Argument is a sure Presumption, *violenta & certa*, those are the Words of the Decretal quoted
in

in *Madam de Gesvres's* Replication; and if Condormition, between Persons who have no Obligations to each other, proves Consummation; *a fortiori*, between Man and Wife, who owe a conjugal Duty to each other, this is the very Argument of *Madam de Gesvres's* Advocate.

But how does he understand it, and in what Sense does he take it? Why, he would prove the Impotency of a Husband by the very same Argument which the Decretal, the Doctors, and himself, make Use of to prove Consummation.

'Tis true, he adjoins an Alternative of his own Invention, *This proves*, says he, *either the Consummation, or Endeavours towards Consummation*: But where will he find, in any of those Texts, so much as one single Word like any such Idea, *Endeavours towards Consummation*? And if, according to those Texts, Cohabitation *in eodem lecto*, is a Proof of Consummation, how can he pretend 'tis only a Proof of Endeavours; that is to say, at once a Proof of Consummation and Non-consummation? Thus, by subtilizing, People fall into Contradiction.

And where do all these Sophisms, drawn from Condormition, center? My Husband *has only us'd Endeavours, and made Attempts upon me*; and this I'll prove, by proving my self a Virgin.

But her Council run from one Contradiction into another. In all his Pleadings, and especially that of triennial Cohabitation, he says, that Efforts may disfigure Virginity, and expunge the Tokens of it; and here he will have it, that Virginity is a Proof of Efforts: What Notions! What Illusions!

The second judiciary Proof of Consummation, is the Husband's Affirmation: A Proof built upon the Decretals themselves, upon the Authority of Doctors, and upon the Reason, *quia vir caput est mulieris*; not only because that Proof *stat pro matrimonio*, but because there can be no certain Proof, and consequently no allowable Proof of Consummation.

And yet, by a revers'd Principle, the Advocate of Madam de Gesvres pretends to build upon the Husband's Affirmation, the Proof both of Failure of Consummation, and Want of Power. For this purpose, fruitful in Sophisms, he bestows two on us, wherein the Truth is violated both in Fact and Law.

The first. This is what he says of the Marquis's Affirmation: *It must therefore be prov'd, that the Marquis de Gesvres has attempted; and it is not sufficient that he says it, because 'tis taken for granted he is not to be believ'd; these*

these Attempts must be otherwise made out, than by his Declaration.

What ! continues he, is it so incredible a Thing, that the Marquis de Gesvres, passing whole Nights with a lawful Spouse, should attempt to compleat his Marriage, since by such Completion he secur'd to himself seventy thousand Livres per Ann. It is certain, that tho' the Marquis de Gesvres had not said it, such Attempts must have been held indubitable.

Would not one believe by this, that the Marquis de Gesvoes had declar'd in his Interrogatory, that he had made bare Attempts, and us'd fruitless Endeavours? Yet the Thing is just the contrary; not a single Word, in all his Answers, concerning Attempts or Endeavours: He has answer'd, and very affirmatively repeated it, *that he has consummated, that he has perform'd the Duty of Matrimony.* How therefore can Madam de Gesvres's Advocate take upon him not only to divide, but to change and alter his Confession, and to father upon the Marquis de Gesvres what he did not say; nay, the very contrary to what he did say?

The second Sophism. The Husband's Declaration is not to be credited, *since it is taken for granted, he is not to be believ'd, &c.*

'Tis taken for granted, that *the Husband is not to be believ'd*; but where do they fetch
this

this Principle from ? Have not the Canons themselves given us for a contrary Principle, that the Wife accusing, and the Husband denying, *standum juramento mariti*?

And what is it they would oppose to the Husband's Affirmation ? The Inspection of the Wife, say they, that mighty Argument of Virginity.

Vain Paradox ! which has no Foundation either in the Canons or Doctors. In the Canons we don't find, that to judge of the Husband's Impotency, the Wife is order'd to be inspected ; less itill, that against the Husband's Affirmation, Recourse was had to so equivocal a Proof ; nay, that no Proof at all was allow'd, unless in the Cases mention'd in the first Part, and which have no Relation to our Cause ; for we don't reckon either as a Precedent or Decision the Chap. *proposuisti*, whose false Induction has been sufficiently confuted.

The Doctors : They are so far from admitting the Inspection of the Wife, in Contradiction to the Husband's Affirmation ; they on the contrary give all the Faith, and all the Credit to the Husband's Oath, and the Inspection of the Wife is rejected, as a frivolous, ambiguous, and deceivable Proof. The Doctors, Canonists, Theologists, Casuists, Physicians, and Anatomists, have been cited ; and 'tis enough for us to
repeat

repeat that Decision of Poncius, which, in a few Words, answers all: *Si mulier asserit se incognitam, vir autem affirmat, & alias non sint aliæ probationes convincentes, credendum est viri juramento juxta caput, si quis; neque vero obstabit, quamvis mulier exhibeat se inspicendam & incorrupta appareat, cum ea inspectio fallax omnino sit, & possit fœmina, in odium viri, facile se virginem ementiri.*

The Marchioness de Gesvres says, as a Principle, That her Husband is not to be believ'd: But why is She to be believ'd?

She has caus'd her Husband to be interrogated upon Heads and Articles. She has answer'd those which the Marquis caus'd to be put to her; we need only pick out five or six Articles, with her Answers, to judge what Regard ought to be had to the Words and Offers of a Person, who could mingle so many Falsities with so much Wit.

First Lie. Madam de Gesvres, in her 30th Interrogatory, and Art. 2. of her Answers, says, that the only Motive which induc'd her to bring this Action against her Husband, was Obedience to her Confessor's Orders, who had given her to understand, that her Salvation was in Danger, and who had refus'd her Absolution from the Beginning of her Marriage, upon Account of the Condition in which she liv'd with him. She

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She has caus'd the same to be pleaded, and even printed: *from the Beginning of her Marriage.* 'Tis an Expression to be observ'd.

She adds upon the 6th Article of her Interrogatory, *That she thought, that their having been before the Priest, and receiv'd the Benediction of the Church, was sufficient to make him her Husband; that the Fondness she shew'd for him, was the Effect of her Ignorance, and not of the Satisfaction she had receiv'd from their conjugal Union.*

She says farthermore upon Article XI *That her Conscience was too much violated when she lay with him, for her to take it Ill when he did not come to lie with her. Nothing more ingenuous, nothing more subtle, than this Answer.*

And yet in Articles IX, X, and XV, she says, *That not being above seventeen Tears old when she was marry'd, she knew not wherein the Duty of Marriage consisted, nor what was meant by consummating a Marriage; that she was ignorant of it 'till she happen'd to be at the Wedding of a Lady of her Acquaintance, who inform'd her of a great many Things she before was ignorant of.*

She affirms the same in her Answers Article XII.

Here are two Things, which, notwithstanding all their Subtilty, do very grossly contradict each other. If our young Inno-

cent

cent, from the Beginning of her Marriage, was ignorant of the Condition of Man and Wife; if she liv'd in that Ignorance for 15 Months at least, how could she, from the Beginning of her Marriage, be scrupulous about the Condition in which they liv'd together? How could she give an Account of it to her Confessor, and inform him so well, as to be refus'd Absolution from the Beginning of her Marriage?

If the Fact of Ignorance is true, the Refusal of Absolution is false; no body can confess what they are ignorant of; she so little believ'd that the Failure of Consummation put her into a Condition of Sin, that she was ignorant what Consummation meant; and thought, that *having been before the Priest, and receiv'd the Church's Benediction*, every Thing was done and consummated.

If, on the contrary, the Refusal of Consummation is true, the Fact of Ignorance is then false, since the Refusal of Absolution, necessarily supposes the Confession of a Sin, known and declar'd in its Circumstances, as a Sin.

Madam *de Gesvres* therefore lies, either in one or t'other of these Facts, or (to speak better) she lies in both; the Contradiction of two Facts, is a sure Proof of a Lye in both.

It

It would be therefore needless to make Reflections upon the pretended Scruple of her Father Confessor; in such a Case, he had been much wiser than the whole Church, for the 12 first Centuries; all which Time, she made it a Rule to herself, to dismiss all Complaints of Husbands and Wives, as suspicious, and dangerous, and so never gave Ear them; but this is not the Point in dispute; we are upon Madam *de Gesvres's* Contradictions.

Second Lye: Madam *de Gesvres* is so rash, as to say, in her Petition, that the Duke *de Tremes* was acquainted with his Son's Impotency, before his Marriage; she throws the same Asperision upon him in Articles XI and XVIII, of her Interrogatories.

The bare Want of Probability would be enough to prove this a Lye; † for can it be thought, that a Man of Honour, Father of a Family, a Duke and Peer, a Man invested with the most considerable Posts, who, in the Marriage of an eldest Son, whom he loves, has for the first Object, the Propagation of his Family, should be capable of so much Folly, as to marry him, even tho' he suspected him to be Impotent, much less if he knew him to be so; yet,

† The Duke *de Tremes* has two more Sons, not much younger than his Eldest.

yet, *Madam de Gesvres* takes upon her to say, and to repeat it in all Places, not that the *Duke de Tremes* suspected, but that he knew his Son to be impotent.

But *Madam de Gesvres* again destroys her Eye, by contradicting it; forgetting that she spoke so positively to this Fact of the *Duke de Tremes*, she advances (by another Imposture) that *he several Times solicited his Son in Private, to do his Endeavours to arrive at Consummation.*

If the *Marquis de Gesvres* were impotent; if the *Duke de Tremes* (his Father) knew him to be so, what would have signify'd these Solicitations? And is it not absurd to say, that a wise Father would have exacted from his Son such Endeavours as he knew would be fruitless?

But here Wit comes to the Relief of Falshood; *Madam de Gesvres* had been shewn by the Articles XIV, and XV, of her Interrogatory, how impertinent, and ill contriv'd those Facts were; and how does she excuse herself? Why, she answers to the first, that *she did not say, that the Duke de Tremes knew of his Son's Impotence any otherwise, than by the Discourses which he had with her upon that Subject.* And what are these pretended Discourses? This she takes care not to let us know, for it is one Forgery invented to palliate another. She
thought

thought she had done enough, by coining a loose Answer, to disembarraſs herſelf from the Objection.

As to the other Fact, ſhe ſays, cunningly, that it is eaſy to reconcile theſe two Articles, (namely, the Father's knowing the Impotence, and adviſing the Son to do his Endeavours) *the Duke de Tremes,, (ſays ſhe) knowing his Son to be Impotent, ſolicited him to do his Endeavours to arrive at Conſummation, thereby to perſuade this Reſpondent, that his Impotence would not laſt long..* She does not ſay, that the Duke ſolicited his Son, as believing his Impotence reparable, but to deceive her the better, *by perſuading her, that this Impotence might not laſt long.*

But, notwithstanding the artful Turn that is given to theſe Answers, they don't bear a Face of Probability : What Illuſion is it to go about to make People believe, that a Father, appriſ'd of his Son's Impotence, which he himſelf believ'd not curable (for that is the Spirit of this Answer) ſhould hope to deceive a Wife in that Particular, and make her believe, that Impotency might be repaired by Efforts. Nothing is more proper (and this is likewise the main Argument of *Madam de Gefvres*, in her Replication) nothing, I ſay, is more proper to convince a Wife of the Fruitleſſneſs of Endeavours, than ſuch Endeavours

vours themselves: But, how diabolical is it, to tax a Father, of the Duke *de Tremes's* Character and Quality, with hazarding, against the Honour and Interest of his Family, the Marriage of a Son, whom he knew to be impotent, even tho' he might think his Impotence curable; the same lying Spirit, which invented the Impotence of the Son, has, to heighten the Story, forged the Privy of the Father.

Lye the third: *Madam de Gesvres*, in Articles XX, XXI, XXII, of her Facts, *that she was sent to Gesvres, because of the Rumour which began to be spread abroad, concerning the Impotence of the Marquis de Gesvres, and for fear she should complain thereof to her Relations, and they should take Measures to annul the Marriage.*

She adds in Article XXII, *that the Duke de Tremes caused one of her She-Relations to tell her, that if she would say she was satisfied with the Marquis de Gesvres, and that he was really her Husband, she should return from Gesvres.*

The Town had heard the false Clamours that had been spread abroad by *Madam de Gesvres's* Emissaries concerning her Banishment to, and Imprisonment in Gesvres; but they had not yet heard any Mention of the ridiculous Comment that is now added to these Impostures.

Is it true that *Madam de Gesvres* was sent to *Gesvres*, as into Banishment; that she was detain'd there as in Prison? Is it true, that she was made to go thither, to hinder the Measures that might be taken about the supposed Impotence? 'Tis all a Lye, and is happily prov'd to be so, by the *Abbot de Mascranney's* Letter, which shews that the Journey to *Gesvres* was the Effect of his Counsel, a Contrivance of *Madam de Gesvres's* own Family, to retrieve, by good Husbandry in that Retirement, part of the profuse Expences which the Marquis, but especially his Lady, had run into since their Marriage.

When it was represented to *Madam de Gesvres's* Article XVII, that this Letter from the *Abbot de Mascranmy* was very opposite to those Things which she so rashly supposes, what Answer did she make? *The Abbot de Mascranmy*, says she, *surpris'd by the Discourse of the Duke de Tremes*, might write any thing he had a mind to.

Wit cannot be always ready at Call; this once it fails Falshood. The *Abbot de Mascranmy*, Uncle and Guardian to *Madam de Gesvres*, under whose Authority she has constantly proceeded, and does still actually proceed in this Cause, who supports her with his Interest and Friendship, who shares with her all the Sentiments of ill
Will

Will, against the Person of the Duke *de Tremes* and his whole Family ; for this Uncle, for this Guardian, to suffer himself to be surpris'd by the Discourses of the Duke *de Tremes*, to contrive with him to write that Letter to the Marquis *de Gesvres* ; all this is so absurd, so ill put together, that in such an Answer Reason is wanting as well as Truth.

Yet this is the Discourse of our young Ignorant, *bred up*, say they, *in a School of Piety, imbued with the Principles of Religion, enlightened with Reason, and guided by the Counsel of several very prudent Relations.*

Among those *very prudent Relations* the Abbot *de Maseranny* is undoubtedly reckon'd for one. And yet 'tis the Testimony of this same Relation, this zealous Guardian, which unwittingly is an Apology for the Duke *de Tremes* and his Son, against the Falsities of Madam *de Gesvres*.

Lye the fourth. Madam *de Gesvres*, believing that she needed only to affirm Things boldly, has taken upon her to assert, that astringent Plaisters, apply'd to the Person of her Husband in his Childhood, had occasion'd some Witherings and Dryings, which she expresses with as much Indecency as Untruth. This is prov'd to be a Lye, by the unanimous Report of the four Searchers, and serves only to let the
Judges

Judges and the World see the Pains Madam *de Gesvres* takes to inform herself, by other Practices, of the Virtue and Efficacy of Astringents.

Was it in that *School of Piety*, that this young Lady, who was, if we believe her, married fifteen Months at least, without knowing what conjugal Duty meant : Did she, I say, learn in that *School of Piety*, the grossest Terms of Consummation, *Erection, Ejaculation*, which she makes a Flourish with three times in her Articles.

It is true, in the whole Course of this Cause, in all her Pleadings, in all her Writings, she tells us, that *Modesty* is out of the Case, and no Part of the Business in Hand : But if *Truth* be the Business in Hand, we are not to look for it in a Mouth from whence so many Lies issue.

Whatever Promises we made to be Moderate in our Terms, we cannot but call Lying by its due Name, and perhaps are even too moderate.

R E C A P I T U L A T I O N.

In Fact, the Marquis *de Gesvres's* good Conformation is manifestly attested by the Searchers, in the first Part of the Reports.

In Law, no Proof is allowable in an Accusation of Impotence, except that of a vicious Conformation ; because all other Proofs are uncertain ; and because Marriage, which, by its Institution, is indissoluble, ought never to depend upon an uncertain Proof.

'Tis much, that at the End of twelve Centuries, the Church should think of admitting those Complaints, which she rejected before without giving Ear to them.

If she has receiv'd different Proofs in the Decretals, she has likewise own'd the Inconveniencies thereof.

As those Proofs were often imperfect, the Judgments, which the Church pass'd upon those Proofs, were only provisional ; the Dissolutions it pronounc'd, were only conditional.

As they were sensible of the Irregularity of conditional Judgments, they at the same Time perceiv'd the Danger of casual and uncertain Proofs ; and when they made Dissolutions definitive, they made to themselves a necessary Rule, never to do it, but upon certain, evident, and infallible Proofs.

Such is the true Spirit of the Church, such that of our Tribunals, in the Abolition of the Congress ; its Uncertainty caus'd its Condemnation ; and by the same

Principle, all other Proofs, which are ambiguous, defective, and uncertain as the Congress, have been buried with it.

The Proofs suggested by the second Part of the Reports, are neither practicable, by reason of their criminal Obscenity; nor to be admitted, for their Uncertainty. This second Part is to be cut off, as null, scandalous, and unnecessary.

The Visitation of the Wife, demanded by herself, is rejected by all the Doctors, Canonists, Theologists, and Physicians, as a deceivable and uncertain Proof; either in itself, and (as *du Laurens* expresses it) in the Institution of Nature, or for the Tricks that may be made use of, and of which there have been so many Examples.

The Multiplication of interlocutory Orders, to be executed one after another, is an Idea, the Intention whereof may be laudable, but whose Execution might be dangerous in the Consequence.

It would be leading the Parties from Gulph to Gulph, from Uncertainty to Uncertainty; keeping them for ever in Law, and opening to bold Women, a Door, to procure to themselves, by means of so many successive Processes, the Pleasure of a kind of perpetual Separation, if they could not obtain that of Dissolution.

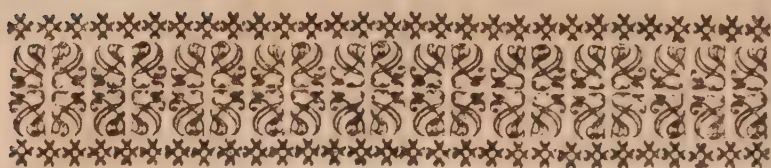
How

How many Women are now with Impatience expecting the Success of this Enterprize? If *Madam de Gesvres* succeeds, proud of such an Example, how many shall we see the next Day, despising the Yoke of Marriage, and committing the same Insults upon their Husbands? How many Evils would this produce, to the Dignity of a Sacrament, to the Honour of Families, to the Condition of the Subject, and to the publick Tranquility.

M. Arrault, Counsellor.

Foulon, Attorney.





EXTRACT
OF THE
Abbot de MASCRANNY'S
LETTER,

Dated, Sept. 13, 1711.

This Letter contains the Advice which the Abbot gives the Marquis de Gesvres, touching the State of his Affairs, and putting him in a Way to discharge the Debts, occasion'd by the Expensiveness of the Husband, but much more by that of the Wife, since their Marriage; after which he concludes his Letter in these Words:

I AM of Opinion, that this Retrenchment, which you must absolutely come to, requires you to make your ordinary Abode at Gesvres, with my Niece, during all the Winter, 'till Spring:

Spring : No doubt, she, and Madam de Caumartin, will do all they can to oppose it, but it will not be impossible to overcome their Resistance ; especially that of my Niece, by setting her the Example yourself ; by keeping constantly in her Company, and never leaving her, but to wait on the King. As for Madam de Caumartin, you need only leave her to make what Noise she thinks fit ; and let her know, that you are both ready to feast it away at Paris, provided she will draw her Purse-Strings, and pay down a hundred thousand Livres, to pay your Debts. I'll warrant, you will hear no more of her ; and so I conclude,

Tour very humble, &c.

M A S C R A N N Y.





P R O O F S

O F T H E

P R I N C I P L E laid down in
the first Memorial on the Behalf
of the Marquis *de* G E S V R E S,

A G A I N S T

*The Interlocutory Order demanded by
the Marchioness de* G E S V R E S.

T H E Case is this: Madam *de* Gesvres
on the 19th of Feb. 1712. present-
ed her Petition to the Official, set-
ting forth, that her Husband is impotent:
that she should be glad if she could live
with him as a Brother; yet, for the Satis-
faction of her Conscience, begging to have
her Marriage with the Marquis *de* Gesvres
declar'd null, and she permitted to marry
another Man.

He

Her Petition being answer'd, and notify'd the 3d of *March*, 1712, she at first obtains a Permission to examine her Husband upon Facts and Articles; wherein she describes the Impotency she accuses her Husband of; says his Testicles are wither'd by drying up of the Nerves; and that the Parts are destitute of Motion; and makes Use of the obscene Terms, Erection and Ejaculation, five or six times together.

The Official orders the *Marquis de Gesvres* to be inspected to know whether the Impotency his Wife accus'd him of was real and manifest, such as she suppos'd it to be in the Articles which she exhibited against him, and which he was to make Answer to.

As for the Inspection of the *Marquis de Gesvres*, the Searchers have unanimously own'd, that there was no Vicioufness of Conformation in his natural Parts, nor withering, nor drying up of the Nerves; therefore, they have not found in him any Mark, nor any Proof of the Impotency *Madam de Gesvres* accus'd him of; and she becomes a false Accuser, and cannot make out her Charge.

Things standing thus, she changes her Battery, and, in Despair of her Cause, proposes her own Person to be inspected, as the only Resource for proving the real manifest Impotency of her Husband, by

her own pretended Virginity. Let us hear her Advocate. Thus he speaks:

There must be Proofs to verify Impotency, when the Wife avers, and the Husband denies. Now, these Proofs cannot possibly be found, but in the Person of the Husband, or in that of the Wife: In the Person of the Husband, when he is unnaturally form'd; in the Wife, when she continues still a Virgin. A Certificate from Bessiere, that was handed about, had given to understand, that the Marquis bore about him the Picture of a Man, so like one, that it could do every Thing but speak. So all the Recourse of my Client was in herself; and therefore in a Petition preferr'd by her the 2d Day of May, she sets forth, that she is still a Virgin, and offers to confirm the same, by being search'd and inspected by Midwives, as usual in the like Cases.

This Certificate of *Bessiere's* had been made publick before *Madam de Gesvres* carry'd her Complaint to the Official; and it is an Untruth, that that Certificate made her change her Battery, which she did not change 'till two Months after her Complaint, and after that the four Searchers had determin'd concerning the Marquis's Conformation, in like Manner as *Bessiere* had judg'd of it.

All the Resource therefore of *Madam de Gesvres* being, according to her Advocate,
reduc'd

reduc'd to the Denudation and View of her Person, to prove her Virginity, we shall now demonstrate, that this last and only Support of her Cause, is yet less probable, and more false, than the first; and that it cannot furnish any Proof of the Marquis's Impotency, because it is neither true nor probable, that a Wife's Virginity can prove a Husband's Impotency.

By the Confession of Madam de Gesvres's Advocate, no Proofs ought to be admitted in this Case, *but such as leave not the least Doubt remaining*; and therein he speaks like all the Authors who have treated of it:
 * *Si Ecclesia dubitaret de impotentia, tunc haberet locum quod non posset separare; quia exponeret se discrimini separando eos quos Deus conjunxit.*

Their Principle is, that the Church may not only err, but has oftentimes err'd in judging of the Impediments of Marriages, upon Account of Impotency, which they back with the Authority of Innocent III, Chap. *Fraternitatis*,† and with that of Chap. *Causam*, where it is said of this Inspection, || *Et oculus Et manus sæpè falluntur*;
 E 5

* *Isidor Pelusiota, lib. 2. ep. 218.* Grave & auctoritatis plenum illud est testimonium quod ab hostibus sumitur.

† *Gulielm. Altis, lib. 4. summa, fol. 293.*

|| *Dominicus Soto in 4. Dist. 34. a 2.*

falluntur; the Searchers Eyes and Hands are oftentimes deceiv'd.

St. Thomas and his Commentators: * *In hoc quandoque Ecclesia errat.*

Commitolus lays down the same Fact, and says it is confess'd by all Theologists: † *Propositio ab omnibus recepta Theologis: Ecclesia de perpetuitate judicans impeditenti matrimonio* (he is speaking of an Impediment thro' Impotency) *falli potest & sæpè fallitur.* The Church (says he) is often times deceiv'd in the Judgments she passes in Accusations of Impotency.

Without going out of the Kingdom, we might cite an infinite Number of Precedents, wherein the Church has been deceiv'd in her Decrees to make Marriages null; without going very far back, those of *Quelinec, Dargendon, de Brie, Langay, Larcher, and Herbin*, furnish eminent Examples; besides others, which, by Means of the Obscurity of the Parties, have escap'd the Notice of the World.

The Business in short, is this: A Marriage has been celebrated by the Church between Persons who petition to be separated for Impotency; it therefore lies upon them to prove, by manifest and indubitable Evidences

* *Suppl. St. Thomæ, Part 3. Quæst. 58. Art. 1.*

† *Moral Answer, lib. 1. Quæst. 113.*

dences, manifestis & certissimis documentis, according to Canon 51 of the 4 Lateran Council under Innocent III, that that Impotency is true, real, natural, and perpetual; no Body can contest this Proposition.

Zachias, * *Cum agitur de dirimendo matrimonio probationes debent esse concludentissimæ, — nec Rota attendit præsumptiones & conjecturas.*

According to the Summary of Chap. *Accepisti*, and according to *Hostiensis*, 'tis necessary, that *indubitato modo convincatur impotentia.*

Sanichus, in Schola Canonica, Edit. 2. Anno 1692, Tom. 1. p. 228. c. 2. No. 1. Impedimentum Impotentia debet evidenti probatione & signo doceri.

And for this Reason the Judgments of the Church, according to the Decretals, and generally according to the Canonists and Theologists, are only provisional: † *Cum appareat ex post facto Ecclesiam fuisse deceptam.*

Dominicus Soto, a Divine of the Council of Trent, || Quomodocumque Separantur conjuges, si postea experimento comperitur, illum qui inhabilis judicatus est habilem esse, remigrare ad primum debet matrimonium.

The

* *Decis. Rota 54. No. 7.*

† *Glossa in cap. Accepisti.*

|| *Dominicus Soto in 4. Dist. 34. A. 2.*

The Custom of this Kingdom does not admit such provisional, conditional Judgments; and its Maxim, *Res judicata pro veritate habetur*, obliges it with stronger Reason not to pronounce Marriages null upon Account of Impotency, but upon most certain and indubitable Proofs, *manifestis & certissimis documentis*.

The Question therefore ought now to be only this, whether the Visitation of the Wife, supposing she be declar'd a Virgin, is a certain and indubitable Proof of the Impotency of the Husband; because its being doubtful, is enough to cause it to be rejected, according to all the Doctors, and even according to the Defender of Madam de Gesvres, as we have before prov'd.

Zachias decides, that this Proof is fallacious: * *Puella ab obstetricibus reperta fuit virgo; sed hujusmodi judicium est fallax*. He quotes *Hostiensis*, *Abbas*, and *Lopes*; and says, that without Regard to a Report in the Wife's Favour, the *Rota* confirm'd the Marriage, and rejected the Wife's Suit.

Certainly the Inspection of the Wife neither decides for or against the Husband's Ability; it did not decide for it in the Affair of the Marquis de Langey; for notwithstanding that his Wife, who had accus'd him

* *Decis Rota in caus. dissol. matrimonii Taurin.*

him of Impotency, was not in the Inspection of her Person found a Virgin, yet her Marriage was declar'd null: The Visitation of the Wife therefore can prove nothing as to the Ability of the Husband. There are a thousand Ways of losing the Marks of Virginity, without having to do with a Man; there are, in like manner, a thousand Ways of recovering them again, when it has been really lost by having to do with a Man, as shall be made appear in a Moment; and consequently Virginity may not be admitted as a Proof of the Husband's Insufficiency.

And indeed nothing is more uncertain, than inspecting the Wife to know whether she be a Virgin or no.

In the Pleadings there have been quoted three Theses of the Faculty of Physick of Paris: *Nulla dantur Virginitatis signa.*

In the Time of St. Cyprian, the World was perswaded of this: *Nam & manus & oculi obstetricum sæpè falluntur.* And even before that Time: *Nec aliqua putet hac se excusatione posse defendi quod inspicì possit.* He therefore rejects this Proof as defective.

* St. Ambrose says, that the ancientest and most knowing Physicians and Surgeons were of Opinion, that Virginity could not possibly be known. *Archiatri dicunt, non satis liquido*

* Ep. ad Syagrium 5. 1. class. novæ Edit.

*liquido comprehendī inspectionis fidem, & ipsi
Medicinæ vetustis Doctoribus id sententiæ fuisse.*

This same Saint speaking of such Women, who, like Madam de Gesvres, petition to be inspected, says, that they are most to be doubted of. *Plus dubitandum de ea quæ inspiciendam se præbuerit, quàm de ea quæ non fuerit inspecta.*

St. Augustin, in civit. Dei, Lib. 1. c. 18. *Obstetrix virginis cujusdam integritatem manu velut explorans sive malevolentia, sive inscitia, sive casu, dum inspexit perdidit.*

Let not therefore Madam de Gesvres's Advocate any more tell us, with a romantic Air, that the Inspection of Wives (as a certain Proof of their Husbands Impotency, in Case they are found to be Virgins) is a Proof that has been admitted in all Times; since he can instance no Inspections, but of young unmarried Women, that had been accus'd of violating their Vow of Virginity; and such Inspections, as the holy Fathers have condemned for being defective and uncertain Proofs, as has been already shewn. What's become of his 1500 Years Antiquity? He has not been able to cite so much as one Decretal; for the only one, namely that of *Proposuiti*, which was made towards the End of the 12th Century, is absolutely unmaintainable;

able ; and whoever would go about to make use of it, as an Authority, must shut his Eyes to the Sun, at Noon Day, and say 'tis Night.

With what Front can they advance, that the Inspection of Wives has been admitted in all Times, and in all Ages, as a Proof of their Husbands Insufficiency ; when 'tis a granted Point, that during the first six Centuries, the Church knew nothing of Impotency's being an Impediment ; and since this same Adversary has been convinc'd, that to those six Centuries must be added six more ; and since there is not any one Decretal thro'out the whole *Title de frigidis*, that does order the Inspection of the Wife, as a Proof of the Ability or Inability of the Husband.

* Zachias: *There are not* (says he) *any certain Marks of Virginity, to know whether it has been violated or no ; this, adds he, is the Sentiment of all the Physicians and Surgeons that have lately written ; acceptissima est hæc conclusio recentioribus omnibus :* He cites *Fubart, lib. 5. of vulgar Errors, c. 4. Perreius, l. de renunciatione. Augenius ep. l. 1. c. 2. Fortunatus fidel. l. 3. de relat. medic. c. 1. Condrochius in methodo testificat. c. 11. Nancelius in Anologia, lib. 7. part. 3. problemat. 5. Ulaius*
in

* Lib. 4. tit. 2. q. 1. n. 14.

in uteribus mulieribus, c. 6. *Vallis de sacra philosophia*, c. 25. *Vincentius Alsatius de quaestibus per epistolas centur.* 4. and several other very learned Physicians, (adds Zachias) which I could name; and among the Lawyers, *Cujas* 17. *observat.* c. 20. reported by *Sanches*, l. 7. *disp.* 113. num. 10.

Cypræus de sponsalibus, cap. 13. sect. 51. *Omnium Doctorum judicio sæpe manus & oculi fallunt, & indicia virginitatis à certitudine absunt, quòd hæc signa facile imitari, & mentiri fœmina possint, & viris fucum facere.*

Other Physicians, Surgeons and Anatomists: *Dulaurens*, a famous Anatomist, *lib.* 7. q. 13. p. 366. of the *Hymen*, and the Marks of Virginitie, assures us, that he is convinc'd, by a great many Experiments, that there is no such Membrane as the *Hymen*, is describ'd to be; and that if such a one is found, it is not in the Institution of Nature; that thus we must look out for other Marks of Virginitie, and he knows of none.

Diamerbroeck, l. 1. c. 26. p. 149. relates the Doubts of *Oribasius*, *Soranus*, *Fernel*, and *Du Laurens*; and concludes, that there is no certain Rule, whereby to judge whether a Woman has lost her Virginitie or no. They furthermore cite, *Gallien*, *Partholomæus*, *Eustachius*, *de Graaf*, *Riolan*, *Plempius*, *Fabricius*, *Henry Minichen*, *Verheëen*, and of late,

late, Lami, Rhosne, Dyonis, Mauriceau, and Devaux, who all affirm, that there is no certain Mark of Virginity.

Lami, in his *Anatomical Discourses*, 2 d. Edit. p. 184. *One can hardly ever certainly know that a Woman is not a Virgin, unless she has had a Child, or has been too much debauch'd.*

Rhosne, a famous Physician, Professor at Lipswick, in his *Treatise of the Duty of a Physician*, in the publick Reports, printed in 1704, says, that the Difficulty of the Deposition proceeds from the Uncertainty of the Signs: *It is difficult, for Example,* says he, *to know whether a young Woman has lost her Virginity, because Virginity has no certain Marks, by which it may be certainly known.*

Lyonis, in his *Anatomy of Man*, demonstrated at the *Garden-Royal*, Demonstration 4. p. 275, rejects the *Hymen*, it not being a Mark of Virginity; and if there is any such, says he, 'tis a very narrow Opening, pinch'd in by the *Caronculi Myrtiformes*; he adds, that there are young Women, who are so narrow, that they can't have to do with Man without great Pain; and pag. 276, he adds, that the internal Orifice of the *Matrix* shuts itself, after Coition, so very close, that the minutest Thing cannot enter; and p.

277, the Neck, as well as the internal Orifice shuts itself again, post coitum.

Mauriceau, in his Treatise of the Distempers of Women, c. 6. No Women, be they of what Age they will, have any Marks whereby their Virginity may be guess'd, besides the Carunculi Myrtiliformes, which make the Neck of the Matrix more narrow; I say, guess'd and not known; for often the Windings and Traces of the Vulva are as hard to know, as that of those three Things mention'd in Scripture.

Devaux, Provost of the Company of Surgeons, at Paris, in his Book of the Art of making Reports in Surgery, printed in 1703. c. 20. p. 420. Among all the Marks which Authors have given of Virginity, there is not one absolutely certain and indubitable. He afterwards confutes *Severin*, *Pineau*, and all the others that say there are Signs of Virginity, and concludes, p. 429. That the most certain Signs to judge of the Virtue of the Sex being of so little Certainty, as they really are, for the Reasons which have been alledg'd, the Judges of Contests upon so nice a Point, ought to follow the Advice of *Subisius*; and Chap. 21. p. 432. The Signs of Virginity are very obscure and very equivocal, as may be seen in the preceding Chapter. After this, can any one be of Opinion with the Defender of *Madam de Gesvres*, that the

Visitation

Visitation of the Wife cannot leave the least Doubt of her Condition remaining?

Is this Defender of *Madam de Gesvres* to be credited, when he calls all the learned and skilful Physicians and Surgeons that ever were, *capricious Speculators*, to the Intent, that the *Pineus's* and *Hequet's* alone may pass for *Apollo's* and *Æsculapius's*, to whom all must give Way? He does not even regard *Solomon*, who places Virginity among the Things that cannot be discover'd: According to the Hebrew Text, *Viam viri in virgine, vel in adolescentula*; as the best Commentators, as well antient as modern, have understood that Text.

Cypræus, before cited, assures us, that 'tis the unanimous Opinion of all the Doctors of Physick (*Omnium Doctorum judicio*) that there are no certain Signs of Virginity.

De Reies Francus Medicus. L. Cui Titulus: Elisius jucundarum questionum campus. q. 39. num. 29. also says, that 'tis the Opinion of all the Physicians; *conclusio omnium Medicorum votis confirmata; signum scilicet virginitatis nullum certum proprium dari, quibus & nos assentimur.* He afterwards rejects all the pretended Signs of Virginity, which he calls Follies and Trifles, *nugæ*, and concludes, that the Visitation of the Wife cannot produce the least Probability before the

the Judges: *Nec illa inspectio aliquid probabile apud judices convincit.*

The Doctors of Law have the same Thought of Virginity: *Cujas*, upon *Chap. Proposuit*, and in *Lib. 17.* of his Observations,, c. 27. *Tagereau*, c. 4. *Hotman*, c. 31. *Boierius*, upon *Chap. Continebatur*: *Hosliensis* in his *Sum.* Fol. 23, *Venice Edition*; *Fevret* of Abuse, c. 14. In *Anne Robert*, the Advocate of a Woman, who accus'd her Husband of Impotency, agrees, that *incerta & periculosa est visitationum fides*; and 'tis this Uncertainty that caus'd the Ordination of the Congress.

The most skilful Doctors, Theologists, or Casuists, are of the same Opinion. We may see *Sanchez*, who quotes one *Fragosus*, a Physician, whom we have not reckon'd among those quoted above.

Pontius, who has the most learnedly written concerning Marriage, l. 7. c. 66. num. 2. *fallax est inspectio an virgo sit.* The Eyes and Hands are deceiv'd in it: num. 8. *Si mulier asserat se incognitam, vir autem affirmet, & alias non sunt aliæ probationes convincentes, credendum est viri juramento juxta cap. Si quis, and Chap. 1. de frigidis: Neque vero obstabit quamvis mulier exhibeat se inspiciendam & incorrupta appareat, cum ea inspectio fallax omnino sit, ac possit famina in odium viri facile se virginem ementiri.* The Visitation

tation of the Wife can conclude nothing in her Favour.

Ibid, num. 4. The same Theologift says, that Chap. *Accepisti* cannot be reconcil'd with Chap. *Laudabilem* ; but by saying, that the Complaints of the Wife ought not to be hearken'd to, unless she complain'd within the first six Months of her Marriage, and addres'd herself to the Bishop, or to his Official.

Comitolus, one of the most generally approv'd Casuists, *Moral-Answers*, lib. 1. q. 113. rejects the Visitation of the Wife, as infamous, and as being incapable of furnishing any Proof. The Thing, says he, having been thus decided in his Time, by the whole University of Padua: *Inspectio virginis vana est & turpis, futilis & vana, quia qui eam adjicit putat dari certa signa virginitatis, cum ea non dari superioribus annis in frequenti cœtu Medicorum Philosophorum Academia Patavina per subtili inter eos Doctores habita disputatione constitutum sit ; turpis, quia totius familiæ nomen & splendor fœdaretur.*

It is not true that this Author afterwards retracts what we just now read: The Case he decides, is of a Man, who had engag'd himself to marry a young Woman, upon Condition she was a Virgin; and he concludes with the Authors he cites, that he is oblig'd to marry her, if she can prove her
 Virginité,

Virginity, *sine crimine & ejus infamia*: Thus the Question is not concerning Virginity, as a Proof of the Impotency of her Husband.

M. de Sainte Beave, a very skilful Doctor in Morality, Case 83. Tome 1. of his Resolutions, printed after his Death: *What I say of the Visitation of the Wife, and the Congress, [he writ before the Regulation of 1677.] 'tis my Opinion, in which I am so well fix'd, that I do not think it in the Power of a Judge to act contrary to it, and to support upon two Means, as uncertain as they are shameful and indecent, a Judgment in Declaration of Nullity of Marriage—— It cannot be judg'd by the Inspection (of the Wife) whether the Marriage has been consummated or no.*

Besides, the Physicians and Canonists agree, that there are a great many made Virginities, and that *in iis plurima sunt commenta*: They bring a hundred Examples of this.

* *Ambrose Pareus* relates, that a Woman, at the second Time of her being with Child, had so contracted her Parts, by Astringents, that they were forc'd to make an Incision, to deliver her of her second Child.

Riolan;

* Above are cited the Books, wherein these Authors advance what they say they have seen.

Riolan : That at *Paris* he saw a Woman brought to Bed, who was so straight, that the Point of a Lancet could not enter.

Hemy Minichin : That a young Woman was brought to Bed, whose Parts could not admit so much as a Pea.

Reies, citing *Nicole*, says, that the Matrons having deliver'd a Woman, made her so straight, that she was no longer in a Condition to suffer the Company of any Man ; and he quotes from *Pinæus*, that a young Woman, who had had a Child before she was married, had so straighten'd herself, that her Husband swore he found her a Virgin. Finally, he condemns *Augenius*, for having given the Particulars of those astringent Remedies : *Quæ enim*, says he, *nefas scire, nescire necesse est*.

Cypræus : *hæc signa imitari & mentiri fæmine & viris fucum facere possunt*.

Zachias, in the Place before-mention'd, says, that 'tis easy so to contract the Parts by Astringents, that the most profligate Strumpet may pass for a Virgin : *facile est per medimenta adeo genitalia fæminea restringi posse, ut corruptissimum & subagitatissimum scortum virginem pre se ferat*.

The Example cited by *Hostenis*, an Official, and learned Casuist, would alone be sufficient to confirm this Truth, *fuit in Pedemonte quædam Domina Caratalla nomine, quæ*

*quæ instrumentum suum adeo coarctavit, quomodo
 & viro & omnibus aliis, inhabilis fuit facta
 nec postea potuit adjuvari per aliquem medi-
 cum.*

St. *Ambrose*, in the afore-cited Epistle has the same Thought, and expresses it with a great deal of *Energy*, *facilius est refutet quod nunquam fecerit, quàm quod fecerit.*

It is, says he, *more easy for a Woman to make herself seem a Virgin, when she is not, than to make herself seem deflower'd, when she really is.*

Doctor *Pontius*, above-cited, affirms the same Thing of factitious Virginities.

* In short, no-body is ignorant, that Nature is perpetually at Work, especially in young People, to repair the Solutions of Continuity.

For this Reason, independant of the Uncertainty of Inspection, a Husband is concern'd to oppose the Search of his Wife especially if they have been separated for a Year; during which Time, both Nature and Art may have been endeavouring at Reparation; besides that, the Ignorance and Covetousness of Matrons, have in all
 Timess

* *Mauriceau*, above-quoted, says, the interual Orifice of the Matrix shuts itself again post coitum: Which is an Answer to Messire *Begon's* Replication, that Astringents can only close the exterior Surface.

Times made the Truth of their Reports very questionable: Besides, it has been observ'd elsewhere, that Madam de Gesvres is not unacquainted with astringent Remedies for contracting the natural Parts.

'Tis Notorious, what is said thereof in the Memoirs of C. D. R. and in the Poet Ovid, *Post aliquot luces, ita cuncta premuntur & apta in sese redeunt. Quid? cum res juvatur: nam rimam fota stringunt fucisque coercent.*

Prophane History, and even Fable, shew us how offensive the discovering of a Woman's Nudities were to the Beholder; and of this we have an Example in the purchasing of Slaves. Seneca speaks thereof with Indignation: *nuda stetit in litore ad fastidium emptoris, omnes corporis partes & inspecta & contractata sunt.*

* The Roman Law, both old and new, concur in exempting Wives from Visitation, even tho' it related to their Marriage; and this, because they would not violate their Honour! Ought our Laws to make more free with the Sex's Modesty?

In the six Reports, made in this Offic-
ality, and which are cited elsewhere, the Wives were not visited, tho' in four of those Reports, they pretended to be Virgins.

VOL II.

F

The

* Justinian: quod in foeminis etiam antiquis impudicum visus est.

The Examples, which Madam *de Gesvres's* Advocate quotes before the Prohibition of the Congress, prove nothing, since he agrees, that the Congress ought to be preceded by the Inspection of the Wife: 'Tis therefore an Argument, that the Inspection was not thought sufficient for proving the Ability or Inability of a Husband, which is obvious in the Tryal of the Marquis *de Langey*.

The Defender of Madam *de Gesvres* owns, that in Chap. *Laudabilem*, nor in no other of the Title *de Frigidis*, there is any Mention made of inspecting the Wife, in order to ascertain the Ability of the Husband; he therefore must confess it is not Canonical, tho' he has boldly affirm'd the contrary over and over.

In the second Memorial, Answer has been given to all the Examples reported by Messire *Begon*, concerning Officialities, and sovereign Courts, as well before, as since the Congress; and it has been made appear, that not any one of them is for him.

* We have elsewhere quoted three Canons in Chap. *de Droit*, which, at least, import, that the Husband must be believ'd, when

* These Chapters are, *Si quis, Accepisti, and Continebatur.*

when he swears he has consummated ; and 'tis plain from *Pontius, lib. 7. c. 63. num. 5.* that this is the Sentiment of the Canonists, *Innocent, in c. 1. prima parte, num. 4. John Andreas, num. 9. Butreius, num. 35. Versu quandocunque probant de Restitutione Spoliatorum. Abbas, in c. 1. num. 3. de clandest. desponsat. Panormitanus c. 1. num. 3. de clandest. nupt. Rota apud Farinacium, vol. 2. concil. decis III. & decis 112. num. 6.*

Dominicus Soto, a Divine of the Council of Trent, who Mr. Pithou refers to, as having very learnedly treated of this Matter, that even Condormition alone makes it impossible to prove non Consummation. * *Si autem maneant in eodem thoro ut conjuges, negativa pars ; Consummatio probari nequitquam potest.*

Madam de Gesvres's Advocate therefore goes about to prove what cannot be prov'd, supposing a Man be made like other Men.

The Gloss upon Chap. *Si quis : Quia fuit sola cum solo creditur cognita ab ipso.*

What then is become of the pretended Proof of Madam de Gesvres's Virginity ? That infinite Number of Theologists, Canonists, Physicians, Surgeons, Anatomists, and ev'n the most enlighten'd Fathers of the Church, *St. Cyprian, St. Ambrose, St. Augustin,*

* Im. 4. sent. de 34. qu. 1. art. 2.

gustin, rejecting this Proof as scandalous, erroneous, and, at least, uncertain.

Are our wisest Theologists, and our best approv'd Casuists, to be look'd upon as Visionaries; while the Defender of *Madam de Gesvres* must pass for an Angel dropp'd from Heaven, to persuade us what 'till now was never believ'd, namely, that inspecting the Wife, is a certain Proof of the Husband's Impotency; all the Doctors in Theology, in Law, in Physick, having look'd upon it as altogether uncertain, and the most defective of all Proofs, and never as an absolute and perpetual Proof of the Husband's Impotency; common Sense is enough to enable any one to conceive, that such Inspection of the Wife may not be admitted for a Proof of her Virginity: *nimis vincere invidiosum*.

Let the Rhetorick of *Madam de Gesvres's* Counsel display itself upon twenty Occasions, (not content with four or five printed Papers, publish'd one after another, like so many Gazettes, to regale the Publick's Curiosity for News;) he will never convince the World, that the Proof of *Madam de Gesvres's* pretended Virginity, can afford the least Probability in the present Cause.

In short, *Dominicus Soto* concludes, that the Judges ought to make use of their utmost Circumspection, and not to separate married

married People ; but to confirm their nuptial Ties, when they meet with nothing but uncertain and doubtful Proofs of Impotency. *Quocirca adhibenda est maxima prudentia judicis, & re dubiâ proferenda est sententia in favorem matrimonii ne dirimatur, alioqui fraudibus & dolis sternaretur via.*

If Soto has been speaking of absolute and unconditional Judgments, such as admitted of no Return to the Nuptial Bed ; what Certainty, and what Infallibility of Proofs would he not have demanded, before he would have pronounc'd a Marriage Null, on Account of Impotency ?

Is it likely therefore, that the Church will run the Risque of violating a Sacrament, by annulling the Marriage of the Marquis de Gesvres, whose Conformation is perfect, and Habit of Body very laudable, and confess'd so to be, by his Antagonists, as has been made appear in the Beginning of this Memorial ; the Proof which Madam de Gesvres proposes of her pretended Virginity, being a great deal more defective and uncertain, than it is scandalous and dishonourable ; and consequently, not being admittable, without giving Occasion to Frauds and Deceits, as Soto says, *fraudibus & dolis.*


The Cause of the Marquis de Gesvres,
which is wholly religious, has Religion
wholly on its Side: * *Religionis gratia con-*
jugia non solventur.

FOULON, *Proctor.*

* St. Gregory, Lib. 9. Ep. 39.



PROOFS




P R O O F S

O F T H E

Other P R I N C I P L E S e s t a -
b l i s h ' d i n t h e s a m e M e m o r i a l
m a d e f o r M o n s i e u r t h e M a r -
q u i s d e G E S V R E S .

A G A I N S T

Madam the Marchioness de GESVRES.



First Proof, that Marriage is indissoluble.

JESUS CHRIST speaks thus of it, in
St. Mark, Chap. 10. Ver. 11, 12. *Who-*
soever shall put away his Wife and marry ano-
ther, committeth Adultery against her. And if
a Woman shall put away her Husband, she com-
mitteth Adultery. And in St. Luke, Chap. 16.

F 4 Ver

Verse 18. *Whosoever putteth away his Wife, and marrieth another, committeth Adultery; and whosoever marrieth her that is put away from her Husband committeth Adultery.*

St. Paul to the Romans: *The Woman which hath a Husband, is bound by the Law of Marriage to her Husband so long as he liveth; but if the Husband be dead, she is loosed from the Law of her Husband: So then, if while her Husband liveth she be married to another Man, she shall be called an Adulteress; but if her Husband be dead she is free from that Law, so that she is no Adulteress, though she be married to another Man.*

St. Austin upon this Passage of St. Paul says thus: † *These Words, which the Apostle repeats so often, are true, lively, holy, and plain: A Wife cannot marry a second Husband unless she be disingag'd from the first; she cannot cease to be the Wife of her first Husband so long as that first Husband is alive: Now if he commits Adultery, she may quit him, but her Engagement is in Force still; so that if she mar-*
ries

† *Lib. II. de Adulter. Conjug. c. 4.* Hæc verba Apostoli toties repetitur, toties inculcat, vera sunt, viva sunt, sana sunt, plana sunt, nullius viri posterioris, mulier esse incipit, nisi prioris esse desinet: esse autem desinet uxor prioris, si moriatur vir ejus, non si fornicetur: licite itaque dimittitur ob causam fornicationis, sed manet vinculum prioris; propter quod fit reus adulterii qui demissam duxerit etiam ob causam fornicationis.

ries another Man, that other Man would be an Adulterer, even tho' she left her former Husband upon Account of his Adultery.

The sacred Bond of Marriage cannot therefore be broken among Christians.

The Church has not had, nor can have any Foundation for this Discipline (authoriz'd by the divine Law, *quos Deus conjunxit, homo non separet*) unless Consummation of Marriage, *Copula*, is not essential to a Christian Marriage; whence it follows, as the Theologists* speak, that Impotency is not an Impediment that can, in its own Nature, annul a Marriage. The Reason of it is invincible; because otherwise, there can be no Sacrament of Marriage between old decrepit People. This is St. *Austin's* Argument, in his Books against *Julian* the Heretick.

† The Church would make a Mockery of People, and of Sacraments, if she bless'd a Marriage which was no Sacrament, with the same Benediction, and the same Prayers, which she made use of to consecrate real Sacraments. *Biel in 4. d. 34. qu. 1. Ec-*

F 5

clesia

* Dominicus Soto, in 4. sent. dist. 34. qu. 1. art. 2. *Vinculum matrimonii jure divino & naturali est indissolubile.*

† Gabriel Biel, in 4. dist. 33. qu. 1. *Impotentia non est impedimentum de se & ex natura contractus impediens & dirimens matrimonium.*

clesia contractum in senibus prorsus ex natura impotentibus approbat, solemnizat, proclamatur. Ibidem, nisi sic dicatur (He is speaking of the Marriage of old People) Ecclesia foveret peccata, in 4. d. 27. qu. 1. a. 4.

* A hundred Passages might be quoted out of *St. Austin*, to confirm this Truth. He confutes the Heretick *Julian*, who defended the Sentiment of *Madam de Gesvres's* Advocate, among other Reasons, because the Gospel had taught him, that the blessed Virgin was *St. Joseph's* Wife; *Julian* maintaining that she was not really the Wife of that Saint, because there had been no Consummation of Marriage between them; *quia concubitus defuit nullo modo fuisse conjugium*: But, says *St. Austin*, *Joseph* did not think he had Power to break the Bond of his Marriage, because he was out of Hopes of being able to consummate it: *Joseph vinculum fidei conjugalis, non ideo judicavit esse solvendum, quia spes commiscendæ carnis ablata*:† The Heretick *Julian*, according to *St. Austin*, spoke, as does *Madam de Gesvres's*

* Lib. 5. in Jul. c. 12. n. 4. & cap. 16. n. 62. Sine corporum commixtione possunt esse conjuges, alioquin non erunt conjuges, ut nihil aliud dicam certe cum sinuerent, sibi que misceri vel non potuerint, vel sine spe suspiciendæ prolis erubuerint, atque noluerint.

† Lib. 5. in Julian. c. 12. num. 46.

Gesvres's Advocate; where there is no Consummation, there is no Sacrament of Marriage. *Nuptias nihil aliud esse quam corporis commixtionem.* St. Ambrose : *Non defloratio virginitatis facit conjugium, sed pactio conjugalis.*

* *Author operis imperfecti in Math. sub nomine Chrysostomi matrimonium non facit coitus; sed voluntas, & ideo non solvit illud separatio corporis.*

Lastly, Vasquez,† the most learned of Jesuits, bears sufficient Testimony in this Place, that the Doctrine of the Church has not alter'd herein: *There will not be found (says he) so much as one Catholick, who makes Copulam, Consummation, Part of the Sacrament of Marriage, unless it be Gratianus, who was of Opinion, there is no Sacrament of Marriage without Consummation, sine Copula, which cannot be maintained without Error.*

|| We may likewise consult the Theologists cited in the Margin.

There

* Lib. de institut. virg. c. 6. l. 2. in Lucam, c. 2.

† Vasquez, de Matrimonio disp. 2. c. 8. num. 96. & disp. 125. c. 9.

|| Magister sent. in 4. dist. 26. Tho. Valdensis, Vol. 2. de Sacramentis, c. 24. Estius in 4 sent. dist. 26. c. 13 & 14. & sect. 14. *he says,* Gratianum partim obscuris, partim vere perperam citatis patrum testimoniis deceptam fuisse ut ita sentiret.

There are some Doctors, who call this Sentiment of *Gratian's* (espoused by *Madam de Gesvres's* Advocate) a Heresy ; others say 'tis only erroneous and rash ; *Vasquez* gives it this last Denomination.

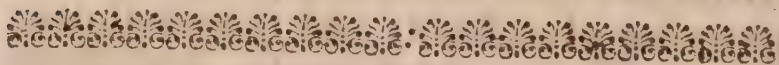
Consummation is not only no essential Part, but it is not even an integrating Part, according to the same Doctors. 'Tis a poor Shift in *Madam de Gesvres's* Advocate, to alledge the Chapter * *Debitum de Bigamis* ; for the Question there is only about Bigamy, as an Impediment to holy Orders. And this Chapter formally decides, that altho' there is no Consummation, Marriage is ne'er the less in Force upon that Account : *profecto ubi deficit inter hujusmodi conjuges commixtio corporum, non deest hujusmodi signaculum Sacramenti* ; which affirms the common Opinion of all Theologists.

Of what Use is it to the Defender of *Madam de Gesvres*, to say, that if Consummation is not essential to Marriage, as a Sacrament ; at least, it is essential, that the married Couple have a mutual Power over each other's Body, and that they bestow it upon each other ; for the common
Sentiment

* *The Gloss upon Chap. non enim 32. v. 2. Julianus dicebat quod non erat verum & perfectum matrimonium sine commixtione carnali, in qua opinione videtur fuisse Gratianus.*

Sentiment of Theologists is, that the holy Virgin having made a Vow of Virginity, could not give to St. Joseph that Power over her own Body; and they maintain, that a Maiden, for Example, who should be under a Contract to marry a Man, and who afterwards repenting of it, should make a simple Vow of keeping her Chastity, might satisfy both Obligations, by contracting the Marriage, and then entering into a Cloyster before Consummation, and in that Case, she would have contracted a true Marriage; *quod sane verum esset matrimonium. Estius in 4 sent. dist. 30. sect. 9. Gonctus de matrimonio, dist. 4. sect. 3. cap. commissum de sponsalibus: Alexander III. suadet cuidam mulieri quæ juratam fidem cuidam sponponderat, se illum intra biennium ducturam, & postea facti penitens proposuerat Religionem ingredi, ut propter reverentiam Sacramenti prius matrimonium contrahat, & postea Religionem ingrediatur. Pontius, lib. 1. de matrimonio, c. 17. num. 8. where he cites several others. In short, 'tis enough that the Church confers the Sacrament of Marriage on old impotent Men.*

Consummation not being then of the Essence of Marriage, it ought not to seem strange, that the Church, for the 12 first Centuries, (during which, it preserv'd a greater Purity in its Discipline) has made



Second P R O O F.

THE Church did not know of the Impediment of Impotence, for the twelve first Centuries; what we just now said, may be sufficient to convince any one of it; and nothing can be said against it, but what might be easily confuted.

A Man must be of an unexempl'd Rashness, to affirm, as the Defender of *Madam de Gesvres* does, that the Canons, *Quod autem*, and *Requisisti*, were made by *St. Gregory the Great*; and to pretend, that the latter is to be found in one of the Letters of that holy Pope, to *St. Austin*, who was sent by him into *England*, for the Conversion of part of the Inhabitants of that Island. We have all the Letters of that Pope, three whereof are address'd to that Apostle of *England*; in one of which, related by venerable *Bede*, he gives Answers to several Questions relating to those new Converts; and even gives them some Dispensation touching some Degrees of Affinity, which, according to the general Discipline

cipline of the Church at that Time, extended to the seventh Degree, hindering Marriages: Yet is there not any mention made, either in that Letter, nor in any other, of the Impediment for Impotence: Thus 'tis a Falsity of the Compilers of the Canons, who forged that, and cited it as *St. Gregory's*. We have consulted all the Editions of *St. Gregory*, to the last; and it not being there, 'tis an unexampl'd Peice of Rashness to dare to affirm, that it is to be found therein.

The Defender of *Madam de Gesvres* silently resorts these Compilers, upon occasion of Chapter *Quod autem*; he should have said Chapters *Quod autem*, *Gratian* relating two under the Name of *St. Gregory*, one address'd *Venerio Caralitano Episcopo*, and the other *Revennati Episcopo*, which is also a Proof of *Gratian's* Error: The Gloss upon these Words, *scriptum est*, adds in *Lombarda*: The Roman Correctors observe that these Chapters are fetch'd from the Capitularies, *Lib. 6. c. 55. causa 27. q. 2. Venerio, &c. & causa 33. qu. 1. Revennati.*

'Tis certain these two Canons are falsely attributed to *St. Gregory*; nor can either begin or authorize a Custom, contrary to that which had been observ'd in the Church ever since the Time of the Apostles.

It

It is confess'd that the Canon *quod popo-
suiſti*, with which the Defender of Madam
de Gefvres would alſo authorize his falſe
Tradition, is really Gregory the ſecond's
taken from his 13th Letter to *Boniface*,
Biſhop in *Germany*, and is to be found
with the other Letters of that Pope in the
ſixth Tome of the Council of *Labbe*, but
even this is a Conviction that the two
Chapters *Quod autem*, (which ſhould by
rights be but one) not being there, are aſ-
falſly aſcrib'd to Gregory II. as to St. Gre-
gory, under whoſe Name *Gratian* relates
them.

As to Chapter *Quod propoſuiſti*, † which
it is granted, is by Gregory II. and which
decides, that if the Wife of the Perſon a-
bout whom he is conſulted, is fall'n into
ſuch a State of Infirmary, as to be no long-
er able to perform the conjugal Duty; af-
ter having ſaid, that it were to be wiſh'd
her Huſband would preſerve Continence,
he permits him, in Caſe he will not ſub-
mit to ſuch Continence, to marry another
Wife, obliging him to give all neceſſary
Aſſiſtance to the firſt : *Si mulier infirmi-
tate correpta viro non valeat debitum reddere*,
&c.

But

* Page 1448.

† Cauſa 32. Queſt. 7.

But the Defender of *Madam de Gesvres* should not have smother'd the Observation approv'd by the Roman Correctors, that that Decision is contrary to the holy Canons, nay, even to the Gospel and St. Paul: *Illud Gregorii sacris Canonibus, imo Evangelicæ & Apostolicæ Doctrinæ penitus invenitur ad versum*; nor the Remark of the Gloss, which assures us, that this Decision is entirely rejected: *Hoc reprobatur.*

In short, posterior Decretals decide the contrary. *Stephen II.* a Pope, who follow'd *Gregory II.* very nearly, does formally decide the contrary: *In responsis*, to divers Consultations, *Resp. 2. Si qui se in conjugio copulaverint, & uni eorum contigerit ut debitum reddere non possit, non liceat eos separare.*

It is absolutely false, that there are other Decretals of that Pope, touching the Question of Impotency, and the Correctors of *Gratian* knew it.

It will be sufficient to refer the Defender of *Madam de Gesvres* to the Observations of *Antonius Augustinus*, and to the Remarks of the Roman Correctors, and of *M. Pithou*, who acknowledge, that the Chapters *Quod autem*, and *Requisisti*, are not by St. *Gregory*.

Let him consult the Preface, which is to the Decree of *Gratian*, corrected by the
 Authority

Authority of the Popes *Pius IV*, *Pius V*, and *Gregory XIII*. he will there see that we must not give too much Credit to the Compilers, *Burchard*, *Ives de Chartres*, nor to *Gratian* : *Sæpe Gratianus arbitrato suo mutat, addit, imminuit, complectitur quod etiam Burchardus & Ivo faciunt*; and to that of *M. Pitbou*, *multa in corpore juris Canonici confecta sine auctoritate, falso adscripta, contraria, corrupta, aliterquam sunt in authenticis detorta, mendose relata*.

The Defender of *Madam de Gesvres* is as ill grounded in his Citation of the 17th Canon of the Council of *Verberic*, where, if we may judge by the Terms of the Declaration, there is no Mention made of Nullity of Marriage, but only of simple Separation, which does not include Nullity of Marriage, no more than Separation upon account of Adultery : * *Si qua mulier se reclamavit quod vir sua nunquam cum ea mansisset, exeant inde ad crucem, & si verum fuerit separentur* : What Conclusion can be drawn from this Canon, which has no Conformity with the Discipline which was observ'd at the Time, when they were so far indulgent, towards the End of the 12th Century; as to permit Separation for Impotence, since there is in it neither Visita-
tion,

* Tome 6. Concil. Labbe, pag. 1653.

tion, or Attestation of seven Relations or Kinsfolk?

Moreover, this same Council, having by the ninth Canon, permitted Husbands, whose Wives would not go with them into the Country, whither they were oblig'd to transport their Habitation, for pressing Reasons, to marry another Wife; and this Disposition being unmaintainable, no more Regard ought to be had to that of the 17th Canon, than to this.

In a Word: This Council should not be reckon'd among the Ecclesiastical Laws; but ought to be put in the same Rank with the imperial and political Laws of Divorcement, which the Roman Church has always disapprov'd, in that they permitted other Marriages, and so much the sooner, as in the Council of *Compeign*, held four Years after that of *Verberie*, those two Canons are absolutely rejected, the contrary being there decided, in the 17th and 18th Canons.

What we have said, is more to rectify the Errors of the Defender of *Madam de Gesvres*, and maintain the Purity of the Discipline of the Roman Church, to the 12th Century, than for the Good of the Cause of the *Marquis de Gesvres*; for they so little ought to oppose to him these three Canons of the Decree, which we shall afterwards

terwards explain, that there are several which formally decide the Nature of his Cause.

First, the Canon * *Si quis*, taken from the Council of *Compeigne*, in 756, under *Pepin*; in which assisted Bishop *George*, Legate from Pope *Steven II.* decides, that if the Wife complains of the Impotence of her Husband, and her Husband by Oath affirms the contrary; the Husband's Oath must be taken, because he is the Head of the Wife: † *Si quis accepit uxorem, & habuit eam aliquo tempore, & ipsa fœmina dicit quod nunquam coisset cum ea, & ille vir dicit quod sic fecit; in veritate viri consistat, quia vir caput est mulieris.* Here this Canon ends, as *Gratian* cites it; but in the Council itself this Canon ends in saying, that the Legate of the Pope gave his Approbation to it: *Gregorius consensit.* This Canon shews, that in *France* they then began to hearken to Complaints of Impotency; but we find no Examples, that any was follow'd by a Declaration of Nullity of Marriage.

In Chap. *Accepisti*, Title *de Frigidis*, which is a Collection of several others, as shall be afterwards said, we find the same Decision of the Canon above cited. *Illar*

autem

* *Causa* 38. qu. 1.

† Tome 6. *Concil. Labbe*, Pag. 1697.

autem si prior post annum aut dimidium ad Episcopum aut missum proclamaverit, dicens, quod non cognovisses eam, tu autem contrarium affirmas, tibi credendum est, eo quod es caput mulieris, quia si proclamare voluerit, cur tam diu tacuit? Cito enim & in parvo tempore scire potuit, si cum ea coire potuisses.

In the third Place, Chap. * Continebatur, which is by Pope Alexander III. in 1180. decides in like Manner, by confirming the preceding Canons, that if the Husband affirms by Oath to have consummated the Marriage, his Wife saying the Contrary, the Husband must be believ'd: † Cum in Decretis habeatur expressum, quod si vir dixerit quod uxorem suam cognoverit, & mulier negaverit, viri standum est veritati: prefato viro qui dicit se mulierem illam cognovisse, fides est adhibenda, si id firmaverit juramento. || We may see in Pontius, that such is the Opinion of the Canonists, Innoc. Johannes Andreus, Butreus, Panorme, Abbas, and of the Rota, according to Farinacius; he cites the Passages.

It must be observ'd, that the Canon Si quis, adds the Reason why the Husband is to

* In Appendice Conc. 3. Later. an. 1179. parte 6. cap. 20.

Extra de disponfat. impuber.

|| Pontius l. 7. c. 63. num. 5.

to be believ'd sooner than the Wife, *quia vir caput est mulieris*; a Reason which cannot be rejected, being founded upon the Holy Scripture. This Maxim in Law is commonly known, *Apertum jus dicitur quando redditur ratio*: The Conclusion ought to follow the Principles. The Reasons related in those of the Decretals, with which the Defender of Madam *de Gesvres* would assist her Cause, are of no Weight, for the Separation of Marriages. They make the Wife say, she is desirous to be a Mother, she is desirous to have Children: *Volo mater esse, volo filios procreare*: A false Reason, and which might as well cause all barren Marriages to be declared Null.

Thus these Decretals, tho' some Application might be made of them to the Nature of the present Cause, yet they could never over-balance the Authority of the three above cited, the Sense of which it is impossible to wrest, being plainly in the Nature of the Cause of the Marquis *de Gesvres*.

After what we have observ'd,* we might
 least

* 27. qu. 2. Quod autem interrogati de his qui matrimonio juncti sunt & nubere non possunt, si illi aliam vel illa alium possit accipere, de his ita scriptum est: vir & mulier si se conjunxerint, & postea dixerit mulier de viro, quod non possit coire cum eo si potest per verum judicium probare quod verum sit accipiat alium. Tit. de Frigidis.

let alone staying to examine the Canons, which we have prov'd to have been cited under false Names, by *Gratian*; but to leave no Scruple upon this Matter remaining,

1. In the two Canons, *Quod autem*, it is only said, that the Wife ought to be admitted to the Accusation of her Husband, if by a true or a just Judgment, she can prove what she advances against her Husband: *Si per verum aut per justum judicium probare possit, quod verum sit.* These Canons therefore shew, that there must be true and decisive Proofs to admit Separation.

These Proofs should be understood, according to the Summary or Argument of Chap. *Accepisti*, of the Examination of the Person of the Man, *per aspectum corporis*, and by no means of that of the Wife; because, in Accusations canonically made upon occult Facts, of which there can be no Proof by Witnesses; the Person accus'd, was believ'd upon his sole Oath, and the Accusation was look'd upon as a Calumny, after the Purgations by Fire, by hot and cold Water, and the like, were abolish'd. Together with the Oath of the Accused, five, seven, and sometimes even fourteen of the Kinsfolk and Relations, that knew him, were made to attest that he spoke the Truth. We may consult all the Chapters of

of the Title *De purgatione canonica*; many of which, are by the same Popes, who decided the Chapters of the Title *de Frigidis*; the Defender of *Madam de Gesvres* must therefore agree, that the Title *de purgatione canonica*, is no more favourable to him, than the Title *de Frigidis*; as we shall prove of this last Title.

* The other Canon of the Decree, as falsely ascrib'd to St. Gregory, as the two preceding, is the Canon *Requisisti*. It is certain, that this cannot it be at all apply'd to the Cause of the *Marquis de Gesvres*: The Question there, is of a Man and his Wife, who both complain of their Impotence:

* 33. quest. 2. *Requisisti* de his qui ob causam frigidæ naturæ dicunt non posse invicem opera carnaliter commisceri: Iste vero, si ea uti non potest pro uxore, habeat eam quasi sororem; quod si retinaculum conjugale voluerint rescindere maneat utriusque innupti: nam si huic non potuit concordare naturaliter, quomodo alteri conveniet — quod si mulier causatur & dicit, *volo esse mater, & filios procreare*, & uterque eorum septima manu propinquorum tactis sacrosanctis reliquiis dicat, ut numquam per commixtionem carnis una caro facti fuissent, tunc videtur mulier secundas nuptias contrahere posse: humanum dico propter infirmitatem carnis eorum. Vir autem qui frigidæ est naturæ, maneat sine conjuge. Quod si & aliam copulam acceperit; tunc hi qui juraverint perjurii crimine rei teneantur, & poenitentia peracta priora cogantur recipere connubia.

potence; *Non posse carnaliter commisceri*: They are advis'd to live together like Brother and Sister, and not to have any Thoughts of other Marriages: *Maneant utrique innupti*; there is no Visitation of either the one or the other: And in Case they would not take this Advice, he does not grant their Separation, till both of 'em shall have sworn upon the holy Relicks, with the Testimony of seven Relations, that they had not been able to consummate the Marriage. To conclude, he does not permit the Wife to marry another, but out of meer Complacency taking Pity on her Infirmary: *Humanum dico propter infirmitatem carnis eorum*. He adds, that if the Husband marry another Wife, and has Children by her, he ought to return to his first Wife. This therefore is nothing but a Provisional Judgment contrary to our Morals; there is no Mention of inspecting either Husband or Wife; they both consent to be separated; and the Wife is not without Difficulty allow'd to marry again. In short, this Sentiment is only propos'd as a private Opinion; *Videtur mulierem secundas nuptias contrahere posse*; which weakens and takes from this Authority, as we shall hereafter make appear.

Further, *Gratian* observes that this Canon is not to take Place, but when the Husband and Wife make the same Confession, *Non potuisse carnaliter commisceri*; *hæc servari præcipitur*, says he, *cum uterque idem fatetur*; because if the Husband swears the contrary he must be believ'd, *standum ejus iudicio*; and consequently, according to *Gratian*, even this Chapter is a Decisive for the Cause of the Marquis de Gesvres.

After having examin'd the three Canons cited in the Decree of *Gratian*, we will do the same by the Chapters of the Decretals and it shall be seen, that the Advocate of Madam de Gesvres, who has bragg'd so loudly that they were favourable to him, deceived himself, or meant to deceive his Reader. They are contain'd under the Title, *De Frigidis & Maleficiatis*. 'Tis surprizing that the Advocate of Madam de Gesvres should make a Jest of the Publick, by prepossessing them with an Ambiguity upon the Word *Frigidity* turn'd his own Way.

He has been told over and over (tho' he does not care to hear it) that this Word *Frigidity* was only put into this Title of the Decretals, to avoid the obscene Term of *Impotentia coeundi*, which may more decently be express'd in our Tongue by Impotency to consummate Marriage. And there

therefore * *Antonius Augustinus*, the Roman Correctors, and M. *Pithou*, add to that Title, & *de Impotenti i coeundi*. Certainly all that's treated of in every Chapter of that Title, is about Inability, either of Husbands or Wives, which they thought was signify'd, tho improperly, by the Word *Frigidity*, designing the whole *Genus* by one of its *Species*. The Master of Sentences, and his Commentators, have so understood that Title.

'Tis a Mistake in *Madam de Gesvres's* Advocate, to pretend that *Frigidity* may consist with a perfect Conformation of all the Parts of the Person accus'd of Impotence, when adult and of a laudable Habit of Body; he will find no Theologist nor Canonist of the same Opinion with him, as to the explaining of that Term.

Neither is it true, that *Frigidity* is always attended with evil Conformation, or an Imperfection in the natural Parts. † The Eunuchs, whose Marriages were ap-

G 2 prov'd

* Magister Sent. 4. Sent. Dist. 34. *Nomine frigiditatis omnis Impotentia coeundi denotatur.*

† V. Angel. sum. 5. matrimonium, qu. 16. n. 11. *Silvester*, v. matrim. 8. qu. 16. citing *Peter Paludanus*.

Dominicus Soto in 4 Dist. 34. qu. 1. art. 2.

Glossa. in cap. *Hi qui*, 32. qu. 7.

Basilius Pontius, l. 7. c. 60. n. 2. de Eunuchis. Mul-

prov'd of by several Canonists and Theologists before *Sixtus Quintus*, were not well conform'd, and yet, according to those Canonists, were compriz'd in the Law against *Frigidity*. A Man may therefore be potent, or have *Motum*, without being well conform'd, without having all his Parts: And consequently all those in whom the Conformation of the whole Body is imperfect are not upon that Account in the Class of *Frigidity*.

We likewise confess that all those who have the Parts necessary to the Consummation of Marriage, in their early Youth, before Puberty, or in an extreme old Age, may be put into this Class of *Frigidity*. But common Sense forbids us to think the same of those, who having reach'd full Puberty have a perfect Conformation of all their Parts.

The

ri exfecti neque viri neque foeminae: Isti ad matrimonium ineundum non sunt inhabiles jure naturali, neque fuerunt etiam jure positivo, usque ad Sixtum V. qui suis litteris illos reddidit inhabiles ad quovis modo contrahendum. .

Cardinalis Tolet. Instruct. l. 7. c. 16. in Annotatione. Castrati utroque orbatu valida matrimonia contrahere nequeunt (quicquid nonnulli falso dicant) ut declaravit Sixtus V. an. 1588, motu proprio ad nuncium suum apud Hispaniarum Regem. Verba leges apud Ledesinam, apud Sanchez. disp. 92. no. 17.

The Canonists and Theologists make several Classes of Impotents or Frigids; * there are some, say they, who are so thro' Debility or Weakness of the Genitals, such as Children and decrepit old Men; there are others so thro' an ill Complexion or Conformation of the Genetals; and this either naturally, being born so; others accidentally, *ut exsecti*, whose Parts have been cut away; lastly, others by Incantation, or Sorcery. There is an Impotence of Nature by reason of Age, which are properly the frigid: *Impotentia naturalis ratione ætatis, ut impotentia pueri & senis; impotentia naturalis complexionis, ut arctatio mulieris, & accidentalis, ut castratio & maleficium.*

According to *Dominicus Soto*, who (*M. Pitbou* says) has handled this Matter the best of any Body. † By the Word *Frigidity* is understood the Impotency we bring into the World with us by evil Conformation, which is perpetual, and not that which came by Accident, and may be cur'd by Medicaments: *Nomine frigiditatis omnis impotentia quæ à natura competit intelligitur, non accidentaria*

G 3

* *Angelus in summa Silvest. 5. matrim. quest. 16. 8.*

§ In 4 Dist. 34. q. 2. art. 2. *Bauny. Sum. de Sacr. c. 12. q. 9. says the same as Tolet.*

cidentalibus quæ transit, sed complexionis naturalis. And again; *Oportet ut impedimentum sit simpliciter perpetuum, ita ut omni prorsus sit remedio destitutum, ut si vir antequam contraheret eunuchus esset, aut exsectus.*

This Divine owns, that where there's a good Conformation, and good Habit of Body, there is no Impotency to consummate Marriage. For, says he, where there's a good Habit of Body, the natural Heat cannot be wanting, and must be vigorous enough to enable the Party to complete his Marriage. His Latin contains an Obscenity which hinders me from translating it literally: *Vis caloris naturalis semen satis ad egestionem digerit.* Therefore, according to him, there's no Impotency in a Body that's well fram'd and strongly built.

Now Madam de Gesvres's own Searchers, who have inspected the Marquis, have found him well conform'd; *each of his Parts, say they, are of the requisite Consistence, Number and Size.* Therefore they ought to have concluded, that there was no Impotency or Frigidity in him.

We must likewise reinforce this Truth (which alone is decisive for the Marquis) with several Testimonies of other Divines.

Cardinal Cajetan, copying after St. Thomas, speaks thus: † The Frigidity, says he, or Impotency, which renders a Marriage null, is not that which proceeds from Age, but that which comes from a natural Defect, which cannot be absolutely cur'd: *Frigiditas, seu Impotentia coeundi, non quidem ex ætate, sed ex defectu naturæ simpliciter incurabilis dirimit matrimonium.*

* Neither does Koninch, an able Jesuit, reckon among the Impotent any but such as are of an infirm Constitution, or whose Body is unnaturally form'd, or who want some of the Parts necessary for Generation, or who are under Fascination: *Impotentia*, says he, must *provenire ex constitutione aut defectu membrorum, aut ex arctitudine, aut etiam ex maleficio.*

To all the Catholick Divines we might add several Heretick ones: I shall only quote one of them, Gerard, a learned Lutheran: § *Canonistæ impotentiam statuunt triplicem, naturalem, accidentalem, maleficalem; naturalem, quæ a naturâ provenit, eaque contingit vel ratione ætatis, ut in impubere, quæ*

G 4 pro-

† Tertia parte, qu. 58. art. 2.

* Disp. 31. de imp. matrimonii dubio. 7.

To these Theologists may be added, Navarre in Sum. Sacram. c. 22. n. 159.

St. Bonav. in 4 dist. 34. a. q. 1.

§ Loc. Theol. Vol. 3. de conjug. n. 659.

progressus ætatis cessat; vel in adulto ex vitio quodam conformationis quod curationem non recepit. Math. xix. v. 12. Sunt Eunuchi qui de utero matris sic nati sunt: accidentalem vocant quæ ex accidenti infertur, vel a morbo, vel a ferro, quando vel aliena violentia fiunt eunuchi; sunt eunuchi ab hominibus facti; vel præpostero zelo, ut Origines; maleficalem, quæ fascino vel veneficio infertur.

In a Thesis of Physick, maintain'd in the Schools of Paris, Nov. 7, 1712. Friget in caduca senectute infantibus nondum nota Venus——juvenibus nihil arduum.

The Council for *Madam de Gesvres* must not therefore pretend to lure the Publick with the equivocal Word *Frigidity*, which properly can be apply'd to none but Children and decrepid old Men, and cannot in Reason extend to those who want Genitals or are under Fascination; and consequently cannot be understood of such who have all the Parts of their Body perfectly constituted. Now *Madam de Gesvres's* own Searchers acknowledge, that the *Marquis's* Body is so constituted; and therefore they ought to have inferr'd, that he was capable of accomplishing his Marriage; for as *Soto* very well argues, in Bodies so rightly temper'd, *vis caloris naturalis semen satis ad egestionem digerit.*

Let not therefore the Council of the other Side tell us, that those, who are call'd frigid, are conform'd like the rest of Mankind: They are indeed form'd like Children and decrepid old Men, but not like those who are in their Bloom of Life: This Proposition is so false, that even Eunuchs, who surely are not form'd like other Men, are not all frigid, nay, are very often hotter and more rampant than others who are perfect Men and have all their natural Parts. We have already prov'd, that before the Prohibition of *Sixtus V.* they might marry; and we all know what is said in *Ecclesiast. Concupiscentia Spadonis defloravit virginem.* I say the same by the crooked, the lame, &c. who are not conform'd like other Men.

The Council of the other Side have another Quibble; they say, a Husband that is defective in his Conformation, should not be suffer'd to pass thro' a Probation with his Wife, to try what he can do with her: I, on the contrary, say such as are so defective, ought to be, for that Reason, indulg'd with a Probation, to try what they can do. And to this Purpose we could give a Hundred Precedents, from the Practice of Officialties. One will Suffice.

In the Officialty of *Lixieux*, in 1704, *Mary du Laurier*, having tax'd *Charles Foudriere*

driere with Impotency; the Searchers having visited him, and found several Vices in his Parts, a Chirurgion, who had him in Hand on several Occasions of Illness, 'till he was 12 Years old, affirm'd he was incapable of Marriage, the Searchers being divided in their Report: Yet by a Sentence of July 12, 1704, he was dismiss'd with his Wife, by whom he actually had several Children. Nothing is more frequent in Episcopal Courts than such Determinations; we can produce several Examples thereof out of the Officialty of *Paris*, as will be shewn by and by.

Madam *de Gesvres's* Advocate knows very well, that in the Articles by him drawn up, upon which she causes her Husband to be interrogated, she accuses him of a vicious Conformation, by asking him, whether he was not once under the Chirurgion's Hands for a Rupture, or some other Indisposition of his Belly: Thus she has fail'd in her Proof of Impotency upon her Husband; since the Searchers found no Viciousness of Conformation in him, and have attested that all his Parts were of a good Consistence: They therefore ought to have pronounc'd him capacitated to consummate his Marriage.

The Thesis above-cited is not to be forgot: *Nulla putes impedimenta in juvene convenientibus organis instructo.*



Third P R O O F.

AFTER having made all these Reflexions upon the Title *De Frigidis*, I now come to an exact Analysis of all the Decretals of that Title, with which the Marchioness's Advocate has so vainly triumph'd: I will demonstrate, that there's no one Chapter, contain'd under that Title, that can in any-wise be apply'd to our Case.

* The first Chapter of that Title *De Frigidis* is the Chapter *Accepisti*; cited *ex Bro-*

* De Frigidis & Maleficiatis Chap. *Acc. Accepisti* mulierem, & per aliquod tempus habuisti per mensem, aut per tres, aut per annum, & nunc primum dixisti te esse frigidæ naturæ, ita ut non potuisses coire cum illa, nec cum aliqua alia: si illa quæ tu uxor esse debuit eadem affirmat quæ tu dicis & probari potest per verum iudicium ita esse ut dicitis, separari potestis, ea tamen ratione ut si aliam acceperis reus perjurii iudicaris, & iterum post peractam poenitentiam priora conubia repetere debebis: Illa autem, si prior post annum aut dimidium ad Episcopum aut ejus missum proclamaveris,

Brocardico; 'tis originally a Compilation from *Burchard*, aliàs *Brocard*: Now almost all this Chapter is in the same Case with that of *Requisisti*, of which we have made an Analysis; and it can't be apply'd to Separation for Impotency, but where both Man and Wife complain reciprocally of each other's Incapacity; for if the Wife accuses her Husband, and he denies the Thing, he is to be believ'd on his Oath, *standum ejus judicio*, unless she complains within the first Months of her Marriage: What is particular in this Canon is, she ought in that Case to prove *per verum judicium*, (tho' the Chapter does not explain what the *verum judicium* must be) that her Accusation is true; the Summary of that Chapter hints it is *per aspectum corporis*: Now, in our Case, Madam *de Gesvres* is single in her Complaint, and has stay'd three Years before she did it;

clamaverit, dicens, quod non cognovisses eam, tu autem contrarium affirmas, tibi credendum est quod es caput mulieris: quia si proclamare voluit, cur tam diu tacuit; cito enim & in parvo tempore scire potuit, si cum ea coire potuisses: si autem in ipsa novitate post mensem aut duos ad Episcopum aut ejus missum proclamaverit, dicens, Volo esse mater & filios procreare, & ideo maritum accepi: sed vir quem accepi frigida est naturæ, & non potest illa facere propter quæ illum accepi; si probari potest per rectum judicium separari potestis, & illa si vult nubat tantum in Domino.

it; and therefore, according to that Chapter, her Complaint ought to be look'd upon as an Imposition; *cur tamdiu tacuit.*

* Next follows the Chap. *Quod Sedem*, of Alexander III. which St. Raymond, the Compiler of the Decretals, had cut out, and which was restor'd by the Roman Correctors, and by M. Pitbou. To shew it has no Relation to our Case, any more than the following one, we shall only give the Texts in their proper Words. It is sufficient, that this Chapter confirms the Tradition of the Roman Church, 'till Ann. 1180, according to which they did not use to separate People, *propter utriusque inguinis rupturam & genitalia abscissa*; that is, they did not use to separate marry'd People, on Account of a vicious Conformation in the Husband.

Remain three Chapters, † whereof the first is that of *Laudabilem*, by Celestin III, in

* In Append. Conc. Later. part. 6. cap. 24. *Quod de illo nobis significasti, qui cum procreare vellet filios, uxori suæ numquam carnis debitum reddidit vel reddere potuit, inquisitioni tuæ taliter respondemus, quod diversa sunt inde decreta diversæ sententiæ; sed consuetudo est Romanæ Ecclesiæ in similibus taliter tenere, quod si non potest eam sicut uxorem habere, ipsam habeat ut sororem.*

† Chap. *Laudabilem*. *Requissisti quantum tempus indulgendum sit naturaliter frigidis ad experimentum copulæ nuptialis. Et infra: Nos vero in præsentî consultatione*

in 1195. It orders three Years Cohabitation, to be reckon'd from the Day of Marriage, if before that Time Impotency cannot be prov'd: After those three Years, it admits the Proof of Impotency *per justum judicium*, without saying what that is; and upon the false Foundation of St. Gregory's Authority, *juxta decretum Gregorii*, it adds to the cited Text, as of St. Gregory, *De viro probare possit quod verum sit*. It exhorts 'em to live together as Brother and Sister; and if they have been parted, and the Man has had Children by another Woman, he is will'd to return to his first Wife. Lastly, It does not admit the Testimony of seven Kinsfolks or Neighbours,

'till

sultatione sentimus, ut à tempore celebrati conjugii, si frigiditas prius probari non possit, cohabitent per triennium, quo elapso, si nec tunc cohabitare voluerint, & juxta decretum Gregorii mulier per rectum judicium de viro probare potuerit, quod cum ea coire non possit, accipiat alium: si autem ille aliam acceperit, separentur: quod si ambo consenserint simul esse, vir eam, etsi non ut uxorem, saltem habeat ut sororem: si autem quod non se cognoverint ambo fatentur, cum septima manu propinquorum, vel vicinorum bonae famae, tactis sacrosanctis Evangeliiis uterque jure jurando dicat, quòd nunquam per carnalem copulam unum caro-effecti fuissent, & tunc videtur quod mulier valeat ad secundas nuptias convolare. Verùm si ille aliam duxerit, tunc hi qui juraverunt rei perjurii teneantur & poenitentia peracta, cogantur ad priora connubia reddere.

'till after the Husband and Wife have both sworn upon the Holy Evangelists, that they have not been able to consummate their Marriage, *quòd nunquam una caro effecti fuissent*. We have already said, that the *justum judicium*, in Accusations like that of Impotency, where there can be nothing more than Suspicion, and where an occult Thing is in Dispute, is the Oath of the accus'd, certify'd for Truth by some Kinsfolks, more or less, according to the different Chapters of the Title of canonical Purgation; which is clear enough in that Canon, by these Words, *De viro probare possit quod verum sit*.

Even the Hereticks of these latter Ages agree in this Principle; 'tis therefore in the Person of the Husband, that a Proof of his Incapacity must be look'd for, when he is the accus'd; as 'tis in the Person of the Wife, that a Proof of her Ineptitude must be look'd for, when the Husband is the Accuser; which is manifest from the following Chapters; when they reciprocally complain of each other's Ineptitude, the Rule to go by in that Case, is the Oath of them both, attested by seven Kinsfolks or Relations.

Lastly, this Chapter pronounces nothing but a provisional Judgment; and consequently nothing can be induc'd from it,
but

but what is favourable to the Case now in Hand.

The Council for the other Side is puzzl'd how to reconcile this Chapter with the foregoing ; but that Difficulty is easily got over by *Pontius*, who has handl'd this Question the most copiously ; *In pœnam taciturnitatis mulieris potior habetur ratio juramenti viri*. Cohabitation is not to be granted, when the Wife does not bring her Complaint in the first Months of her Marriage ; and the Husband's Oath in that Case is to have the Preference.

The second is the Chapter || *Fraternitatis* of *Innocent III*, in 1212. There a Woman
is

|| *Fraternitatis tuæ Litteras accepimus continentes quod O. mulier cuidam viro matrimonialiter nupsit, cum quo per multos annos morata, non potuit carnaliter ab ipso cognosci, licet autem per Archipresbyterum tuum super hoc fuisses edoctus : tamen tu volens certitudinem habere pleniorē, quasdam matronas suæ parochiæ providas & honestas ad tuam præsentiam evocâsti, districtè illis injungens sub periculo animarum ut mulierem ipsam prudenter inspicerent, utrum idonea esset ad viriles amplexus, quæ tandem in fide sua tibi asseruerunt constanter quod eadem nunquam poterat esse mater aut conjux, tanquam cui naturale deerat instrumentum, unde inter ipsam & virum divortium celebrâsti, mulierem inducens ut ad religionem aliquam se transferret perpetuam continentiam servatura, & viro licentiam tribuisti ut uxorem duceret, quia pater fieri cupiebat. Contigit autem postea*

postea, quod mulier invenit qui seras hujusmodi referavit, & abjiciens continentiam quam promisit, G. Latori præsentium super nupsit. Quamvis igitur semiplenè nobis expresseris, quomodo dicta mulier se promiserit continentiam servaturam, utrum videlicet simplici verbo an voto solemnè utrumvè ad religionem transferit, ut promisit, an contra promissionem suam in domo remanserit, & qualiter seras illius fecerit referari, utrum videlicet artificio medici, an concubitu viri, seu alio quolibet modo; nos tamen perspicaciter attendentes, quòd impedimentum illud non erat perpetuum, quòd præter divinum miraculum per opus humanum absque corporali periculo potuit removeri, sententiam divortii per errorem probabilem novimus esse prolatam, cum pateat ex post facto, quod ipsa cognoscibilis erat, cujus simili commiscetur: & ideo inter ipsam & primum virum dicimus matrimonium extitisse; quare inter eam & præfatum Guil. matrimonium non esse censemus, eosque præcipimus ab invicem separari. Et si prædicta mulier ad religionem transferit, sicut asserit promississe, primus vir non cognovit eandem, cum ea remaneat, cum qua postmodum autoritate Ecclesiæ contraxit, alioquin illa dimissa debet ad illam redire; cum qua primò contraxit, nisi se voto mulier illa constrinxerit ad continentiam servandam, ut intelligatur per hoc cum præfato Guil. fornicata fuisse, vel nisi se fornicario modo alii se viro miscuerit, ut primus vir prætextu fornicationis ejus velit consortium declinare: Nam si tantum simplici verbo promisit se continentiam servaturam, & postea in conspectu Ecclesiæ nupsit memorato Guil. quamdiu articulus iste dubitabilis erat præsumi non debet quod fornicaretur cum illo; sed à modo non debet aliquatenus cum illo remanere. Per hæc autem questionem illam noveris esse solutam, qua quæritur utrum ea quæ adeo arcta est, ut nulli possit carnaliter commisceri, nisi per incisionem aut alio simili modo violentia inferatur: non solummodo levis, sed fortè tam gravis, ut ex ea mortis periculum teneatur ad
matrimonium

is charg'd with Incapacity; *tanquam cui naturale deerat Instrumentum*. She was visited by seven Matrons, who concluded, that she could never be fit for Marriage; upon which, she was separated from her Husband. She afterwards marry'd another Man, and had Children by him; and the Pope was of Opinion, she ought to return to her first Husband. He concludes this Chapter, by saying, that one cannot be too tender and circumspect in pronouncing Separations of Marriage; and that such Decrees ought to be only provisional: *cum finale judicium pendeat ex futuro*. And therefore in *France* we do not countenance such Returnings of the Parties to each other; and the Maxim of our Tribunal is, that *res judicata habetur pro veritate*.

I need not observe, that this Chapter favours the Case of *Madam de Gesvres*. The Wife is accus'd; she is inspected. This is according to the Rules: The Matrons were erroneous in their Report touching the

matrimonium contrahendum debet idonea perhiberi. Similiter, quæ viro cui nupserat adeò arcta est, ut numquam ab eo valeat deflorari; si ab eo per judicium Ecclesiæ separata & nubat alteri, cui arcta non sit, & per frequentem usum secundi reddatur etiam apta primo, utrum ad eum redire debeat, cum quo prius fœdus inierat conjugale. De talibus autem non est facile judicandum, cum finale judicium pendeat ex futuro.

the Wife's Ineptitude; the Inspection therefore of the Wife cannot be Ground to build a Sentence of Separation upon.

Remains the Chapter * *Litteræ* of *Honorius III*, in 1220, where certainly the Question is about mutual Ineptitude, and by Fascination; the Husband and Wife demanded to be separated. The Wife was inspected by seven Matrons, who declar'd her a Virgin; they were both put under Penance; after which the Pope gave them Leave to quit each other, provided they both swore, and their Oaths were back'd with

* *Litteræ vestræ nobis transmissæ continebant, quod cum causa matrimonii quæ inter M. mulierem & A. ejus virum vertitur, vobis fuisset ab I. Papa prædicatione nostre commissa, dicta M. proposuit, quod cum octo annis elapsis dicto A. fuisset matrimonialiter copulata, & licet diu cohabitasset eidem, adhuc integra permanebat: eo quod prædictus vir ejus non habebat potentiam coeundi; quare petebat divortium celebrari. Prædictus vero fatebatur, quod illam nunquam cognoverat, tamen se habere potentiam cognoscendi alias asserbat: vos vero, ne id confiterentur in fraudem à matronis bonæ opinionis, fide dignis ac expertis in opere nuptiali, dictam fecistis inspicere mulierem: quæ perhibuerunt testimonium ipsam adhuc virginem permanere, postmodum per Presbyterum de cujus paræcia vir extitit, fecistis inquiri, utrùm ipse aliquam cognovisset, nec per inquisitionem ipsam vobis constare potuit, aliquam esse carnaliter cognitam ab eodem. Muliere autem requirente divortium, & dicente quod mater esse volebat & filios procreare; proponente viro quod paratus erat stare consilio Ecclesiæ,*

with the Testimony of seven Kinsfolks, that they could not consummate their Marriage: *se commisceri carnaliter nequivisse.* This is not the Marquis *de Gesvres's* Case, since he affirms he has consummated; and if need were to produce Witnesses to his Sincerity and Credibility, he might find as many and more than the severest Chap. off the Title *de purgatione Canonica* has requir'd. Therefore the Advocate of Madam *de Gesvres*, who loves to frame *Chimera's* to fight with, in objecting, that the Marquis *de Gesvres* affirming he has consummated, might be an Untruth, ought to have kept the Untruth for his Client.

We however see in these Chapters of the Decretals, a Change of Discipline introduc'd insensibly in the *Roman Church*; for *Alexander III*, a very acute Man, affirms in 1180, towards the latter End of the

clesiæ, injunxistis eisdem, ut poenitentiam agerent de commissis, etsi forte placuerit Deo qui matrimonii fuit institutor & autor, ut opus matrimonii consummarent: qui post plures terminos ad vestram præsentiam reversi, *consona voce dixerunt*, quod non poterant carnaliter commisceri: quocirca mandamus, quatenus si ita est, & constiterit vobis præfatum virum & mulierem intra prædictos octo annos, per continuum triennium insimul habitasse: ipsis cum septima manu propinquorum firmentibus juramento se commisceri carnaliter nequivisse, proferatis divortii sententiam inter eos.

the † 12th Century, that the *Roman* Church did not use to separate marry'd People on Account of natural Impotency, &c. *Propter talem infirmitatem, utriusque inguinis rupturam, & genitalia abscissa, vel propter alia maleficia legitimè conjunctos dividere.*

We find the same Decision in the Appendix of the third *Lateran* Council in 1179, part 6. ch. 10 & 24. *Propter naturalem frigiditatem, vel alia maleficia legitimè conjuncti non sunt separandi*, according to the Summary.

It is true, the *Gloss* does call by the Name of a Piece of Advice, what is declar'd in the Decretal of *Alexander III*; but the most favourable Thought we can have in Excuse of the Author of that *Gloss*, is, that he spoke conformably to the Age wherein he liv'd, when the Custom of the Court of *Rome* might be alter'd with Respect to such Sort of Impotencies as are spoken of in that Chapter; *Propter utriusque inguinis rupturam, vel propter alia maleficia & genitalia abscissa*; because it is a visible Abuse of the Terms, Language, and Maxims of the Law, to say, that what is observ'd in the Church for a general Custom, is only a Piece of Advice. Has not Custom the Force of a Law, where

† Chap. Quod Sedem, above-quoted.

where there's no Law to the contrary
Consuetudo vim habet legis ubi non est lex
 Besides, this Explication of the *Gloss* cannot be apply'd to the Summary of the above-cited Chapter; wherein it is absolutely forbidden to dissolve Marriages for Impotency; *non sunt separandi*. This therefore was a Law in the *Roman Church*.

This alone would convince every reasonable Person, that the *Roman Church* had not annull'd any Marriages for any Sort of Impotency, before the Time of Pope *Alexander III*, or towards the End of the 12th Century; and we defy the Advocate of *Madam de Gesvres* to perswade any one of the contrary, except they be such as take false Allegations for Truths.

Farthermore, we have prov'd, that the *Roman Church* did not use to admit any Cause for Nullity of Marriages, unless they were within the forbidden Degrees of Consanguinity.

Hitherto the Advocate of *Madam de Gesvres* has been spending his Breath to no Purpose, in exclaiming, as if all the Decretals were for him: For there's neither Canons of the Decree, nor Chapters of the Decretals, *sub titulo Frigidis*, that are in our Case. This has been demonstrated; almost all the Canons and Decretals pronounce actually in our Favour; and especially three

Canons

Canons or Chapters, which the Advocate of *Madam de Gesvres* would fain slur over, not being able to answer them.

Lastly, he cites for her three Chapters, *Causam*, *Litteræ*, and *Quod proposuisti de probationibus*: But in the Chapter *Causam*, the Question is evidently concerning a Woman who had a Mind to turn Nun, her Marriage not having been consummated; *quæ se virginem & monacham profitetur*; in which Case 'tis unlawful to doubt of marry'd Peoples being incapable of Separation. This Woman was gone into a Convent; and they did not abide by the first Visitation of Matrons; a second was order'd, and the Husband allow'd to make Use of other Proofs, *Probationes alias hoc negotium contingentes quas pars utralibet duxerit producendas*.

As for the Chapter *Litteræ*, the Analysis we have already made thereof, shews pretty plainly the Temerity of *Madam de Gesvres's* Advocate, in daring to cite it in this Case, when he knows in his Conscience the Question there was about Sorcery.

But *Madam de Gesvres's* Advocate shelters himself with the Chapter *Proposuisti*, which at first Glance seems to favour him; and therefore he insinuates, that the Holy Ghost in that Place spoke by the Mouth of Pope Gregory VIII, in which he is more
rash

rash than any of the *Italian* Doctors; among whom not one ever dar'd to attribute this Privilege to the Popes in their Answers to the Consultations of private Men.

The Contents of Chapter *Proposuiſti*, is this: A Wife comes, and ſays her Husband has neither conſummed, nor can conſummate his Marriage; and ſwears it ſo, and gets herſelf certify'd for a Virgin by the Report of ſeven Matrons; the Pope answers, ſhe is to be credited before her Husband: *Videtur igitur nobis quod juramentum to puellæ & testimonio ſeptem illarum mulierum fides eſt potius adhibenda.*

But iſt, It is certain, that *Gregory VIII* who poſſeſs'd the See of *Rome* but 56 Days could ſcarce be conſulted in ſo ſhort Space; and it is not the Cuſtom of the Court of *Rome* to be ſo precipitant in her Judgments.

2dly, More than this, *Immola*, *Joannes Andreas*, and *Butreius* ſay, that in the Caſe, as well as in Chapter *Cauſam*, the Queſtion was concerning a Marriage contracted, and non-conſummed; that the Maiden had conſecrated her Purity by Vow; and therefore it was the Intereſt of Religion, that ſerves as a Motive to the Deciſion, ſuppoſing it were ſo. The Letters of this Pope are indeed collected in the 7th Volume of Councils; *Baronius* like

with

wife gives an Extract of 'em under the Year 1187 of his Annals. The Decretal we are now speaking of, is not to be found either in the Councils, or in that Annalist.

3dly, This pretended Decision of Gregory VIII cannot be apply'd to our Customs, since the Husband was not inspected, in order to determine concerning his State; and this is most certainly so, because the Wife did not so much accuse him of Impotency, as of not exerting his Capacity. This Decision, or rather Advice of the Pope, is not conditional, but absolute; and therefore 'tis contrary to all the others, which declare the Nullity of the Marriages conditionally to return in *statu quo*, except where a Vow of Religion was the Case.

How is it possible therefore for People to pretend to make a Rule of a Decision, contrary to the Discipline generally observ'd in the *Roman Church*, before and after Gregory VIII. *Standum iudicio viri*, as it is decided by three Canons of Councils, and Chapters of Decretals; and in the other Decretals, if the Husband who is accus'd of Impotency, proceeds to marry another Woman, and has Children by her, he must relinquish her, and return to his first Wife; whereof however we see nothing in this Chapter, as has been just now observ'd.

We have shewn in another Memoriall, that there's no proving the Husband an Impotent by inspecting the Wife.

M.*de St. Beauve* was not unacquainted with the Canonical Decisions; 'tis notorious he makes Use of 'em in his Resolutions of Cases of Conscience; he therefore was not ignorant of this Decretal: And yet he determines, that the Inspection of the Wife being yet more fallacious than indecent, a Judge may not make Use of it for declaring a Marriage null.

* In short, *Melchier Canus*, an eminent Theologist of the Council of *Trent*, in his excellent Book, where he handles at large the Authority of the Proofs, and the Grounds of Theological Questions, lays down a very judicious Rule for judging what Weight we ought to allow the Decisions of the Popes in their Decretals. The Popes, says he, often return Answer to the Consultations of the Bishops, by bare signifying their Thoughts upon the Cases propos'd to them, without intending their Answer for a Decision, and a Rule absolutely to be follow'd: *Respondent sapè Pontifices ad privatas hujus aut illius Episcopi quæstiones suam opinionem de rebus propositis explicando, non sententiam ferendo*; which is easy to be discern'd,

* L. 6. de Locis Theolog. cap. 8.

cern'd, says that Author, when they make Use of the Word *videtur*, 'tis our Opinion, as in this Decretal, *Proposuiſti*, where that Word is us'd: *Videtur*, says he, *judiciorum infirmat certitudinem*. Therefore this Opinion alone of a Pope cannot make a Law; a Law is imperious: *Lex imperat*.

* *Canus*, to prove his Proposition, quotes several Precedents of contrary Decisions of Popes, who did not think themselves bound (even in Cases of Conscience) to follow what had been declar'd by their Predecessors. This ought to be the less suspicious in this Divine, because in the same Book he defends the Infallibility of the Popes.

Gregory IX, in his Brief, licensing and approving the Collection of the five Books of Decretals publish'd by *Fr. Raymund*, says of the Decisions of his Predecessors, *quædam propter contrarietatem confusionem inducere videbantur*.

To this Chapter *de Probationibus*, so remarkable and so opposite to the others, we may likewise super-add what was said by † Gregory VII, who held the See of Rome a very long Space of Time, and made as many Decisions as any of his Predecessors or Successors in that See. He confesses, that both himself and other Popes have

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been

* In the same Chapter.

† L. 9. Epist. 31.

been made to speak Things as they knew nothing of, and to give Answers to the Consultations of private Men, without ever so much as acquainting them with those Consultations: *Multa tamquam a nobis deferuntur dicta & scripta, nobis nescientibus.* If all these Reasons cannot suffice for an Answer to that Chapter *de Probationibus*, nothing ever can.

Madam *de Gesvres's* Advocate does as good as confess himself worsted, in owning, that this Decretal *has no other Weight, than as 'tis authoriz'd by the Course of Judgments.* 'Tis these Judgments therefore, and not the Decretal, we must come upon. Now these Judgments make absolutely against him, as hath been shewn in another Memorial; and so he's utterly disarm'd.

After this, how can he have the Assurance to say, as he does, that *it is to abrogate the whole Body of the Decretals*, to deny their Decisiveness for Madam *de Gesvres.*





Fourth P R O O F,

*Against the Requisition of the two obscene
Tokens.*

HAD St. Thomas written what the Advocate of Madam de Gesvres unjustly obtrudes upon him, as hath been made appear in the preceding Memorials, would not he (together within the Advocate) have come with the Censure pronounc'd by Alexander VII. against several Propositions of Morality, of which this is Part: Prop. 46. *Est probabilis opinio quæ dicit esse tantum veniale osculum habitum ob delectationem carnalem quæ ex osculo oritur, secluso periculo consensus ulterioris & pollutionis.* Dominicus Soto in 4 d. 34. a. 2. *Tactus & oscula per se sunt mortalia nisi inter veros conjuges.* Navarre in 5. præceptum, c. 16. n. 13. *Tactus verendum nullatenus debent consentiri.*

St. Austin would have taught Madam's Advocate, had he consulted him, that those Motions which the Searchers (whom he in vain endeavours to excuse) requir'd to see in the Person of the Marquis de Gesvres,
H 3 are

are in themselves wicked, and become criminal, so soon as ever they are excited or consented to. The whole six Books which that Father wrote against *Julian* the Heretick, contain nothing else : *Julian* maintain'd, that being natural, they were not wicked ; St. *Austin* maintain'd the contrary ; because the Apostle tells us, we ought incessantly to strive against them : † *tu bonum dicis contra quod pugnas, ego malum* : And that holy Doctor of the Church expressly decides, that consenting to a Motion of Concupiscence, is the Sin of Wantonness : *Cui consentire luxuria est*. * And *Tunc enim excedit licitum limitem quando ejus motibus ceditur*. To think otherwise, is to be a Cynic, according to the same Father : || *Non de illa* (meaning these Motions) *erubescat licitus & honestus conjugatorum concubitus, si non est morbus*. The holy Council of Trent has decided the same Thing, in declaring, that the Concupiscence which the Apostle calls Sin, is actually a Sin when its Motions are consented to, and not resisted.

There is one, and but one Case, where in those Motions are excusable; and that

iss

† L. 4. Jul. c. 64.

* L. 5. c. 7.

|| L. 2. de Nup. & Concup. c. 33.

is, when the Husband and Wife come together to perform the Action of Marriage. This is a Maxim which the loosest Casuists dare not deny; and the Advocate of Madam de Gevres might have learn'd from them, that whatever is call'd Motion of the Flesh consented to; *Caro concupiscit adversus Spiritum*, is in its Nature mortal; *in re veneranda non est levitas materia.*

In short, this first Token procur'd or consented to, does certainly expose the Person so procuring or consenting, to the imminent Danger of falling into the second; and consequently, for that very Reason, it would be a mortal Sin; *qui amat periculum peribit in illo.* Now, it is not lawful for any Man, no, not for the saving of his Life, to procure to himself that second Token by high feeding, by Medicaments, or any other Ways, according to the unanimous Opinion of all the Casuists. See upon this Head (among others) Navarre, Cardinal Tolet, and Vasquez. This last speaks of it thus: * *Non licet medico etiam gratia curandi agrotum, medicamento naturam irri-are, to provoke Nature to the second Token, Sicut non liceret manibus eodem fine naturam exonerare.*

* In prim. secunda disp. 113. No. 4 & 105. c. 2.

The Foundation of this Decision is a plain Maxim in Morality; what is a Sin may not be desir'd upon any Account, nor is it lawful to consent thereto; * *quod de se malum est, ob nullam causam placere debet aut concupisci.*

We challenge the Advocate of *Madam de Gesvres* to answer these Proofs; for 'tis no Answer to say he's not a Divine; for he might with the same Ease have consulted the Theologists as Canonists, and no doubt he did; but he found they made against him.

It must therefore be granted me, that the second Part of the Searchers Report is absolutely indefensible. † They have perjured in their Ministry, by demanding for a Proof of the Marquis's Manhood those obscene Tokens which he could not shew them without a Crime.

After this, is it not surprizing, that *Madam de Gesvres's* Advocate shall take upon him to affirm, with his wonted Confidence, or rather audacious Rashness, that

* Toletus, l. 5. c. 13. No. 2 & 6. *speaking of those Signs, gravissimè peccant medici, qui talem actum consulunt . . . nec excusantur à mortale qui eis obediunt, Sylvius 2. 2. q. 15. a. 4. Conolus 3.*

† *Cardinal Cajetan 2. 2. q. 154. a. 4. tales actus cum uxore non sunt peccata mortalia. Er. a. 5. tales tactus sunt ex suo genere venerei.*

of all the Searchers in the World, never any confided in Conformation alone?—He knows of six Reports made in this very Office, under six several Officials, wherein twelve Physicians of the Faculty of *Paris*, and twelve sworn Chirurgions, have affirm'd positively, that Men well conform'd, or who have only some Sort of Viciousness that may be cur'd, were capable to consummate Marriage; and never insisted upon any other Token of Virility, either first or second; some of them even saying, that they could not lawfully require any other Marks of Ability, than good Conformation. Four of these Reports confirm, that they did not look in the Wife's Person for a Proof of Non-consummation, tho' there were some Doubt as to the Conformation of the Husband's. To convince the World of this, we have caus'd to be printed those six Reports, and subjoin'd them to this Memorial.

Because the Sieurs *Gayant* and *Hequet* were not of Opinion, that the Marquis's good Conformation was a sufficient Proof of his Capacity, shall that authorize the Advocate of the other Side to treat, as a Paradox, the contrary Sentiment of twelve of their Betters, to whom they ought, in good Manners, to deferr to? Not having

done so, this same Advocate was at length oblig'd to stand corrected, as to the second Part of their Report; which smells of the School of *Aristippus* and *Diogenes*.

In short, Madam's Defender is forc'd to own, that the Marquis's pretended Impotency, is not an *Effect* either of *Sickliness* of *Constitution*, or any *Accident*, or any *Distemper*, or *Fascination*. 'Tis therefore an Impotency which subsists no where, but in the empty Fancies of a Woman's Pericranium, and in the chimerical Ideas of her Advocate; because we don't find in any Theologist, that there are other Causes of Impotency, besides those which he allows the Marquis can't be accus'd of; for as to Impotency thro' Age, he does not tax him with that; and instead of shortening any of his Days, he even makes him a free Gift of some Months.

We must however recollect what has been already observ'd, that the Marquis *des Gesvres* was accus'd by his Wife of an accidental Impotency, caus'd by a Rupture in his Belly, and for which he had been under the Surgeons Hands. This appears to be groundless, from the Searchers Report, and the Confession which her Advocate just now made concerning the same.

In Truth, a Man must be in utter Despair of his Cause, to conclude a Plea, (so void of Reason) as the said Advocate does, in saying, *That the Marquis de Gesvres has no other Proof of his Capacity, but what he gave to himself by his Oath.* Thus a good Habit of Body, a sound Constitution, no accidental Impotency, no Fascination upon his Person, all this amounts to no Proof of his Ability, if we are to believe Madam's Advocate; but 'tis to be hop'd the Publick will not give into such Notions.

Now, as for this Proof of Oath, which Madam's Advocate cannot deprive the Marquis of, is it not canonical, authoriz'd by three, as well Canons of Councils, as Chapters of Decretals? * The first of these Councils, is that of *Compeigne*, confirm'd by that of *Lateran*; *Viro credendum est, quia caput mulieris*: Upon which, the *Gloss* likewise adds another Reason; which is, there's hardly such a Thing as an impotent Man to be met with; † *vix aliquis invenitur impotens ad coeundum.*

When the scandalous Congress was in Practice, there were thought to be some impotent Men, because they miscarry'd in
that

* In Appendice.

† In Cap. Si quis.

that Trial; and Marriages of able Men were frequently declar'd null, by Means of their Wives Imposture: In full Confidence that their Husbands would fail in that Encounter, they continually brought Accusations of Impotency, right or wrong, 'twas all a Case to them. The *Larchers*, the *Breys*, the *Dargentons*, the *Langeys*, the *Harbins*, are notorious Examples of this, without mentioning many more, who, for the Obscurity of their Names and Families, have escap'd the publick Notice.

In a Word, according to the *Gloss* upon Chapter *Si quis* above-cited, it is a very rare Thing to find an impotent Man: *vix aliquis invenitur impotens ad coeundum*. They are absolutely to be suppos'd potent, if they shew a good Conformation, with a praise-worthy Habit of Body; 'tis more than a moral Certainty of their Capacity, and enough for an Ecclesiastical Court to ground a Judgment in their Favour.

Instead of laying hold of the Congress for an Authority for the first Token, it ought rather to serve for a contrary Purpose: For this first Token, as has been said, cannot be consented to, but where Man and Wife are the acting Persons, as in the Congress they were; but in no other Case can it be permitted, as is confess'd by
all

all the Casuists to a Man. Therefore in banishing the Congress, the Searchers are with stronger Reason forbid to insist upon that first Token. The Congress was only scandalous, without being sinful; and * this first Token is infamous and sinful; the second is abominable.

* *He means by this first Sign, Erection: and by the second Sign, Ejaculation, or, Emission of Seed. vide the Searchers Reports.*





E X T R A C T

O F T H E

Reports and Judgments of the Officialty at Paris in Causes of Impotency.

R E P O R T in the Case of *John de But*, Master-Fringe-maker, charg'd with Impotency by *Genevieve-Helena Marcault* his Wife; he being visited by *Renaudot* a Physician, and *le Bel* a Surgeon, by Order of the Official: They say, that after they had maturely and for a long Time examin'd all the Parts of *de But*, as well natural as others that might give Light in the Case, as also his Plight of Body, his Age, the just Disposition and Proportion of all his Parts; but especially his *Puntle*, which we find to be of as proper a Thickness, Length and

* *De But*, in 1675.

The Marquis de GESVRES. 183

and Colour as can be wish'd; and his *Baws* likewise to be without any Viciousness or evil Conformation that appear'd to us, we judge he is capacitated to perform the Action of Marriage from all these outward Marks, *which are the only ones we ought lawfully to go by.* Paris, July 18, 1675. Sign'd by them, and attested by the *Sieur de Combes.* And on Aug. 23, 1675, by the Sentence of M. de Benjamin the Official, the said *Marcault* was put from her Demand, and order'd to return to her Husband and live with him.

* *John Royer*, accus'd of Impotency by *Mary Etiennette le Moyne*, order'd to be inspected, and was inspected by *Denis Puilon* and *Afforti*, Physicians, *Lewis Ravinet* and *Bontentuit*, Chirurgions: *We have found his Body well conform'd, and the external Parts, serving for Generation, in their natural Condition, and a very laudable Conformation; so that upon the whole we cannot think him impotent: In Testimony whereof we have sign'd this present Report,* Jan. 3, 1694. And by the Sentence of M. *Kerrier*, the Official, the said *le Moyne* was order'd to return to her Husband, March 9. 1694. Sign'd and attested, *De Combes.*

† Visita-

* Royer in 1694.

† Visitation order'd by the Official of *Paris* upon the Body of *Joseph le Page*, who is tax'd with Impotency by *Nichola de Loris* his Wife, and perform'd by *Deuxivoi* and *de Farci*, Physicians, *Paris* and *du Fertre*, Chirurgions : We have found the exterior of his Person to be like other Mens, the P—ck of a good Conformation, and naturally situated, with the Nut bare, its appurtenant Parts fring'd about with soft fine Hair, the Cod of an unexceptionable Thickness and Extent, and in it are Vessels of a good Conformation and Size, but terminating unequally ; on the Right Side they end in a small flabby Substance, instead of a true Testicle ; and on the Left Side we observ'd a Testicle fix'd to the Extremity of one of the Vessels as usual, invested in its Tunicle ; which Left Testicle we don't find to be at all flabby, but of a middling Size : Upon the whole, we are of Opinion the said *le Page* is capable of Marriage, but in a feeble Manner ; Witness our Hands, this 5th of *March*, 1684. And by the Sentence of *M. Cheron*, the Official, the said *de Loris's* Petition is rejected, and she enjoin'd to adhere to her Husband. Sign'd *May* 10, 1684. *Cheron* ; and attested, *De Combes*.

In

* In the Cause of *Louisa Villot*, accusing of Impotency *Peter Damour*, an Inspection order'd, and executed by *Rainsent* and *Affonti*, Physicians, *Franchet* and *Colignon*, Chirurgions: We have proceeded to inspect *Peter Damour*, Master-Sadler at *Paris*; and having considerately examin'd his Genitals, we have found them well constituted, and in good Condition as to their Size, Conformation, and Situation, for the Feat of Generation; and yet upon the Suggestion of the said *Damour*, who told us, that when he embraces his Wife his Instrument will just stand, but no more; supposing it true, that may be repair'd and rectify'd in time by proper Remedies. *Paris, Jan. 16, 1703.* Sign'd by them. And by the Official, *M. Vivant's* Sentence, the said *Villot's* Demand was refus'd, and she order'd to go home to her Husband, and cohabit with him as her lawful Spouse. Sign'd *Vivant*; and attested *de Combes, April 24, 1704.*

† In the Cause of Damoiselle *Mary Lewis Bucheres*, accusing of Impotency *Anthony de Bret*, an Inspection is order'd and perform'd by *Vernage* and *Litræ*, Physicians, *Lombard* and *Delon*, Chirurgions: We find the String of the Fore-skin is shorter than it should

* *Le Bret* in 1703.

† *Damour* in 1703.

should be for giving the Nut free Scope to extend it self when it swells. 2. That the Body of the Left Testicle is very diminutive and decay'd, its Tunicle separated, the Spermatick Vessels very much disorder'd by crooked swoln Veins. 3. That the Right Testicle is not of a due Thickness, tho' thicker than the other; that it is somewhat wither'd, and the Spermatick Vessels disorder'd by crooked swoln Veins. Wherefore we do not think that the natural Parts of the said *Sieur le Bret* have all the Disposition requisite for the well performing the Function they were design'd for; yet we can't say he is impotent, till we have first inspected the Wife. *Paris, 11 July, 1703. Sign'd.* And on the 22d of *June, 1703*, the Wife was inspected by the said Searchers, and by two Matrons; they observ'd no Viciousness of Conformation in her Womb; the *Valvulae* were circular, and the *Carunculae Myrtiformes*, plac'd at the Neck of the Sheath, were soft, supple, flexible, entire, and did not seem to have suffer'd any Violence or Displacing, and the Cavity of the Womb-Pipe was free, and without any Obstacle. Therefore they are of Opinion that she is not incapable of the Action of Marriage, and that there has been no Intromission, consequently that she's a Virgin; and that if the Marriage

has

has not been consummated, 'tis her Husband's Fault, because of his great Debility, and the evil Conformation of his Genitals. And by another Sentence of the Official, *August 1, 1703*, a new Inspection order'd, *Bourges* and *Thuilier*, Physicians, *Franchet* and *Meri*, Chirurgions: We have proceeded to inspect the Parts dedicated to Generation; and after having examin'd them with all possible Attention, we have found no Defect therein which can hinder Generation. *Paris, Aug. 13, 1703*. And by the Sentence of *M. Chapelier*, the Official, *October 15, 1703*, we have enjoin'd both Parties, viz. the *Sieur le Bret* and the said *Bucheres*, to acknowledge each other for Husband and Wife. Sign'd *Chapelier, J. Vivant, Pirot, Nivelles*, and *Gilbert*.

* In 1708, *John-Baptist Totin*, accus'd of Impotency by *Louisa-Renata Fey*, an Inspection order'd by *M. Norman* the Official, and executed by *Thuilier* and *Thomasin*, Physicians, and *Aubert* and *Colignon*, Chirurgions, have with great Care examin'd the principal Parts contributing to Generation, namely, the *Penis*, its Pipe, the Stones, all which Parts we have found of a good and laudable Conformation; and, consequently, 'tis our Opinion, that the said *Totin* is not

* *Totin* in 1708.

not to be suspected of Impotency: This we certify to be true. Attested, *De Combess.*

* *Frances de Saulx*, accusing of Impotency *Claude Grenet*, her Husband; an Inspection was order'd by *M. Dorsane* the Official, and perform'd by *Afforti* and *Leauté*, Physicians, *Acquel* and *Roland*, Chirurgions: We have, say they, proceeded to visit the *Penis* of the said *Claude Grenet*, which we find to be in due condition; except, that the Right Testicle is larger and better condition'd than the Left; the Spermatick Vessels likewise seem'd to us to be lank, weak and fall'n away; which however cannot absolutely impede the Action of Generation, only it may make it less frequent and not so vigorous; we therefore can't say he's impotent but potent. Nov. 19, 1710.

There was no Judgment pass'd upon this Report, the Parties proceeding no farther.

* *Grenet in 1710.*



R E M A R K S.

1. **T**HESSE six Reports make it plain, that from bare Conformation, tho' feeble and impair'd in some, the Searchers

con-

concluded the Parties capable of accomplishing their Marriage.

2. Four of these Reports prove they did not in the Person of the Wife look for the Proof of Non-consummation of Marriage, tho' there was some Doubt as to the Conformation of the Husband.

3. The Searchers did not require either the first or second Token, even in the Case where the Husbands declar'd they had not been able to consummate; and the Officialty of *Paris*, without these Signs, rejected the Wives Demand, and sent them Home to their Husbands.

In short, to judge of Manhood from Conformation alone, whether perfect or perfectable in Time, is in these six Reports under six different Officials, the Opinion of twelve different Physicians of the Faculty of *Paris*, and of twelve Master-Surgeons, which ought to prevail against that of the Sieurs *Hequet* and *Gayent*, expressly condemn'd in the first of these seven Reports, where the Searchers, speaking of the good Conformation of the Parties Tackle, say, that *these are the only Tokens of Virility they can lawfully go by.*

There are many more Instances of marry'd Women who have not been visited. *De Combes* takes Notice of two, one of *Doiznel*,

190 *The PLEADINGS for*
nel, try'd in 1690, the other of *Bodart*, in
1700.

In the Affair of *Cabu*, try'd in the Officialty of *Blois*; in that of *le Groß*, try'd in the Officialty of *Reims*, the Women were not visited.

RECAPITULATION.

First Proof. Marriage is indissoluble, and Consummation no essential Part of Marriage, nor even the Power of consummating.

2. The Church for twelve entire Centuries did not separate marry'd People for Impotency; prov'd from the Canons of Councils, and two Chapters of Decretals.

3. The Decretals don't propose the Inspection of the Wife, as a Proof of Impotency in the Husband; the Chapter *Proposuisti* is suspected, single, indefensible, contrary to the Canons of Councils, and to the other Chapters of Decretals, and cannot be justly apply'd but in Favour of Religion.

4. It is not lawful to order the Husband when visited, to shew to the Searchers the first obscene Token, Erection.

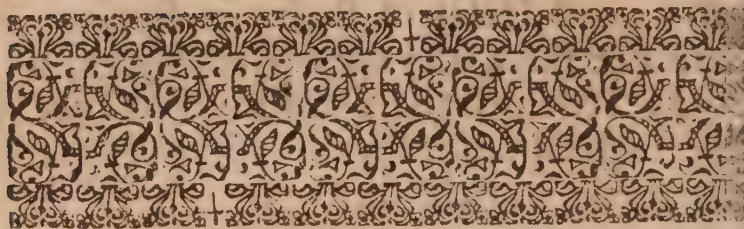
In short, 'tis not the Custom of Officialties, to order the Wife to be inspected, in order to prove the Husband an Impotent.

tent. Therefore Conformation alone, join'd
to a good Habit of Body, in Persons who
are not Boys, nor decrepid old Men, is the
only Physical and Natural Proof that can
be requir'd of a Man's Virility, now the
Congress is abolish'd.

Foulon, Proctor.



REPLI.



REPLICATION

FOR THE

Marquis de GESVRES,

AGAINST THE

MARCHIONESS *his Wife*

THE Answer of Madam de Gesvres intitul'd, *The General Answer*, may be reduc'd to three Sorts of Objections, which shall be the Division of this *Replication*.

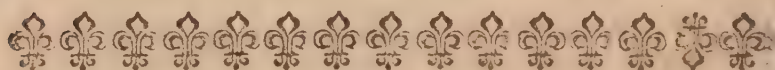
In the first Part Answer shall be given to the Objections which concern the true Doctrine of the Church, ever immutable in its primitive Discipline in the first Period; its different Alterations in the second Period; and the present Condition of its Discipline in Questions of Impotency. And

it shall be demonstrated, that nothing is more false in this Affair, nothing more contrary to the Mind and to the Doctrine of the Church, than the new System of the moral Proofs, that is, to speak plain, the conjectural, equivocal, and uncertain Proofs propos'd by *Madam de Gesvres*,

In the second Part shall be refuted the Objections made to the sage Regulation of 1677. In its Principle and in its Consequences shall be made appear, that 'tis in vain to go about, by subtil Comparisons to revive, under the Notion of moral Proofs, all those unworthy Means which their Uncertainty, yet more dreadful than their Infamy, has abolish'd with the Congress; and that the Inspection of the Wife, offer'd and demanded by herself, is so little admissible in the Mind of the Canons, if narrowly examin'd, and found so false by Experience, attested by the Doctors, that it deserves not the Name of a moral Proof.

In the third, Satisfaction shall be given to the Objections that impeach the Custom establish'd in the Episcopal Courts, (and particularly in that of *Paris*, since the Abolition of the Congress) of admitting no other Proofs in Suits for Impotency, than that of good or bad Conformation. A Custom, prov'd as well from the Form and Tenour of the Reports made in these Mat-

ters since that time, as from the different Judgments which have pass'd relating to the same. And it shall be made plain, that throughout the whole Course of *Madam de Gesvres's* Defence, Endeavours have been used (tho' in vain) to introduce into an Ecclesiastical Court such Proofs as it would be unlawful to a Faculty of Physick to propose in its Schools, and which tend indirectly, not to say openly, to re-establish the Congress.



P A R T I.

Answer to the Objections which concern the true Doctrine of the Church; its primitive Discipline in the first Period; its different Alterations in the second Period, and it's Condition at present.

NOTHING is more false in the Doctrine of the Church, that is, in the Doctrine of *Jesus Christ*, than the System of pretended moral Proofs in Processes enter'd into for dissolving, or to speak more properly, for declaring Marriages null.

Nothing is more false than that same System, not only in the Discipline of the first Period, but even in the Principle which predominated in the Discipline of the second Period, and yet more in the latter State of this Discipline.

To give all due Scope to the Explication and Application of these two Propositions, we must first fairly lay down a true State of our Question.

Madam *de Gesvres* comes not to ask of the Judges a provisional Separation, a conditional and revocable Dissolution of her Marriage, such as us'd to be practis'd in the Times of the Decretals: No, she is better instructed by her sharp-sighted Counsel; she knows, that the Practice of those provisional Judgments, and of those conditional Dissolutions, is abrogated in our Tribunals; that in our Courts they have look'd upon them as a Scandal in the Church, and a Disorder in the State, both as to Uncertainty of the Condition of People, and the Trouble to Consciences which flow'd from this Practice in the second Period; that, in a Word, if Marriage is made null, it is definitively, irrevocably, and beyond Recall so.

This is Madam *de Gesvres's* Objection, these the Inferences of her Demand.

The Question therefore, is, whether according to the true Doctrine of the Church and the true Intent of its Discipline, can be admitted what Madam de Gesvres calls moral Proofs, in order to pronounce the Nullity of a Marriage solemnly celebrated and to determine, that tho' there has been a Celebration, there has been no Sacrament.

Doctrine of the Church.

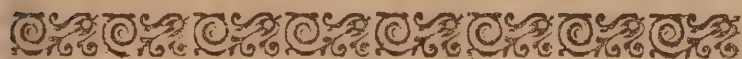
We have said, (and 'tis our Principle) that as the Intention of Jesus Christ, in the Institution of the Sacrament of Marriage, was to render it indissoluble, the Intention of his Church is not to admit without evident Certainty any Means that may tend to dissolve it, and consequently to reject all Proofs that in their own Nature, or upon Experience, are uncertain.

We have said, and we repeat it with the same Confidence, that 'tis in this Indissolubility consists the holy Parallel of the Union of Husband and Wife by the Sacrament, and that of Jesus Christ with his Church by Grace.

The Word Indissolubility offends Madam de Gesvres: *A new Principle*, says she, *is productive of strange Consequences! For though if the Indissolubility of the Bond is what constitutes the Essence of the Sacrament, it will follow*

follow, that an Impotent may be capable of this same Sacrament. For (she goes on) do but set aside, and abstract his Impotency, and presently the Bond which shall tie him to a Wife, may be indissoluble, and as such represent the indissoluble Union of Jesus Christ and his Church, which will make a compleat Sacrament of it. And then she cries out, *What Theology's this! Whence has the Author fetch'd the Doctrine he preaches to us! We should be glad, if he'd instance some Body that has spoken as he speaks!*

The Principle is not new, nor is it productive of such strange Consequences they seem so fearful of.



A N S W E R.

THE Principle is not new. What! is it a new Doctrine, to say, that the Indissolubility of Marriage, is the Essence of this Sacrament? Did ever any one question it, before the Answer of Madam de Gesvres? Nor certainly will this Answer, with all the dogmatical Air and magisterial Tone which it is deliver'd in, be able to make any Body doubt it.

We can quote an Author, who alone is sufficient without any other, since 'tis from him all others fetch their Doctrine; and that is Jesus Christ. It is a common Topic among Theologists, that before this divine Author, Matrimony had not the Character of a Sacrament; yet questionless it was somewhat more than *conjunctio Maris & Fœminæ*, otherwise it would not have differ'd from the sensual Conjunction of Beasts. It was a Society of Life between Persons who were by the Laws capable of that Union: *Inter legitimas personas*; and the Design of that Society was also to be durable, and not dissoluble. Such was the Definition which the Lawyers gave of it in those Times, from the sole Authority of human Laws. But this Engagement being then but a civil Contract, the Parties who believ'd themselves bound by nothing more than their own Consent, made no Scruple of loosning themselves by a contrary Will. Hence came the free and frequent Custom of arbitrary Divorcings, permitted and warranted by the Laws.

But when Jesus Christ was pleas'd to elevate Matrimony to the Dignity of a Sacrament, he, at the same Time, declar'd it indissoluble by that sacred Law: *Quos Deus conjunxit, Homo non separet*: The Indissolubility and the Sacrament which were at the same

same

same Time form'd by this Word of the Sovereign Legillator Jesus Christ, is a manifest Proof, that it was the only Remedy his divine Wisdom pitch'd upon against those licentious Divorcements, which *Moses* permitted to the *Jews* purely *ad duritiem cordis*, for the Hardness of their Hearts: He added to Matrimony the Character of a Sacrament, on Purpose to render it indissoluble.

Indissolubility is therefore so much the Essence of the Sacrament, that it is by this Character the Marriage of Christians differs from that of *Pagans*. 'Tis the essential and juridical Difference of Christian Marriage.

'Twere needless to load this Replication with Crowds of Quotations, to confirm a Truth taught us by Religion, and dictated to us by Reason. *St. Austin* ought to satisfy in this Case: Of all the Definitions of Marriages, that which that holy Doctor gives us, is the justest and most concise: *Matrimonium est conjunctionis inseparabilis Sacramentum.*

Let those who suggest to *Madam de Gevres* a contrary Language, quote any Body who says as they do; that it is manifestly false, that the mystick Sign of Jesus Christ's Union with the Church (which makes of Marriage a Sacrament) is fix'd to the In-

I 4 dissolubility

dissolubility of the Bond. 'Tis precisely in this Indissolubility of both Unions, that their Parallel does essentially consist; and as Jesus Christ was pleas'd, that the Union which he contracted with his Church should endure 'till the Consummation of Ages, so he was also pleas'd, that the Union which the Husband and Wife contracted together by the Sacrament of Marriage, should have no other Determination but their Lives. Our Principle therefore is not a novel Principle: It is as old and as true as the Gospel of Jesus Christ, who is the Author of it. Neither is it true, that the Principle is productive of the Consequence which they on the other Side affect to draw from it in Relation to the Marriage of an Impotent. We do not now dispute, whether Impotency be a Cause of Nullity in Marriage. To handle such a Question, as in Law, would be to suppose in Fact, that there is a certain Impotency which may be the Subject thereof; and we are very far from supposing, or allowing of so false a Fact.

Let Impotency, (which the Gospel, the Source of Christian Laws, has no where mention'd) let it, I say, after twelve Centuries from the Settlement of the Church, become an Impediment destructive of Marriage; let the superiour Courts follow, or take:

take for granted the Custom thereof; it is not the Subject of our Question.

We do not, from the Indissolubility of Marriage in it self, conclude the Validity and Indissolubility of the Marriage of an Impotent. Marriage in general is indissoluble, therefore the Marriage of an Impotent is good and indissoluble. To argue thus, would be wild, extravagantly wild. We very well know, that if the Church has rank'd Impotency in the Number of Impediments which cut off Marriage, consequently to declare the Marriage of an Impotent null, is not dissolving a Marriage, 'tis adjudging the Marriage never did exist.

This therefore is not the Consequence we draw from the Principle of Indissolubility; but we conclude from it, (and our Conclusion is rational) that Matrimony being indissoluble in its Rise and Institution, the Cause which can dissolve it, ought, in the true Doctrine of the Church, to be really, evidently, and infallibly certain, because (we say it again and again) the Spirit and Intention of the Church is not to allow the Dignity of a Sacrament, the Condition of Persons whom it has ty'd together, to depend upon a faulty, equivocal, and uncertain Proof.

The School of Theology, says the Answer, has plac'd the mystick Sign (that is to say, the Essence of the Sacrament) not in the Indissolubility of the Bond, nor even in the mutual Tradition (or Enjoyment) of Bodies, but in the Possibility, or, which is the same Thing, the Capacity which ought to be between the two Spouses for attaining that Tradition or Enjoyment. And then he goes on, and says, such is manifestly the Doctrine of the Church, such that which Madam *de Gesvres's* Advocate laid down for a Principle.

Whoever reads all together what he has written in his general Answer, touching the novel Tradition of Bodies, and the Texts he has quoted for Authorities, will think they were really in Favour of his Thought. But not to waste Time in Explications, he no longer places the Essence of the Sacrament in the Act of Tradition or Enjoyment; he restrains it to the Possibility of Tradition, and he does wisely: He's sensible, that to place the mystick Sign, the Essence of a Sacrament, the Union representative of that of Jesus Christ, in the very Act of Consummation, were an Impurity which would startle Mankind.

But endeavouring to avoid one Rock, he runs upon another. He thought it would not look well to speak like *Julian the Apostle*,

flute, Wickliff, and Gratian who has been condemn'd in that Point. But when he separates himself from his Authors, for very Shame; when he rejects the System of actual Consummation, to shelter himself in that of Possibility of Consummation, he finds himself the only Man of his Opinion; and will never be able to instance, either Theologick-School or Doctor of the Church, that says as he does, that the Essence of a Sacrament, that the Sign, representative of Jesus Christ's Union, consists in a Possibility of consummating.

Let them say, if they will, (and 'tis the most plausible Thing they can say) that Matrimony having a two-fold End, the procreating of Children, and the extinguishing of Concupiscence; the Impotent, who are unable to do either one or the other, is a Subject incapable of the Sacrament. But to say, that that material and terrestrial Union of Bodies, whether habitual, whether actual, is the very Sign representative of the celestial and spiritual Union of Jesus Christ, is what the Purity of Religion can by no Means endure.

When, to support this *Idea*, some should make Use of these Words of *Genesis*: *Et erunt duo in carne una; ecce nunc os ex ossibus meis, caro ex carne mea*: They are not aware, that from the System of possible
Enjoyment

Enjoyment they relapse into that of actual Enjoyment. The Scripture does not say *poterunt esse*; but, *erunt duo in carne una* &c. *Ecce nunc* (actually) *os ex ossibus*, &c. But let's really speak, as the holy Doctors have spoken, *erunt duo in carne una*; this Expression neither signifies actual Enjoyment nor Possibility of Enjoyment, by those Words. The Scripture meant nothing but a mere perfect Union of two Persons, in like manner as it says of the primitive Christians, that they were *cor unum & anima una*.

Ecce nunc os ex ossibus meis, &c. These Words, which only refer to the Origin of the Woman who was taken from the Man's Side, have no other Object but the intimate Relation, the mutual Correspondence of the Husband's Affection, and the Wife's Submission; and as this Union of Hearts and Minds is perpetual and continual, it is not allowable to say, that that is not the Object of the holy Texts, rather than that transitory momentaneous Union of Bodies.

Did the Council of the other Side think, when he a second Time quoted the Chapter, *Debitum de Big.* that, by the Direction of the Canons, a Man who had been marry'd could not aspire to the Order of Priesthood? A certain private Man, who was marry'd a
second

second Time, had receiv'd the Sacrament, but not consummated the Marriage. Pope *Innocent III.* decides in Favour of the principal Object, (Priesthood) that he might be admitted thereunto, in like manner as the Canons decide, that a marry'd Woman, if she continues a Virgin, may be loosed in order to take the Veil of Religion; but so little Colour is there for inferring from thence, that the Sacrament consists either in the Act, or in the Possibility of consummating, that, on the contrary, the same Chap. *Debitum* decides, that tho' there was not Consummation, the Marriage was no less a Marriage, *profecto ubi deficit inter hujusmodi conjuges commixtio corporum, non deest hujusmodi signaculum Sacramenti.*

Neither the Master of the Sentences, nor *St. Thomas*, have clearly said, that Consummation, or the Power of consummating, are essential to the Sacrament. So too, *St. Thomas's* Disciple, in his Commentary upon the Master of the Sentences, whose Text he gives at large, lays it expressly down as a Conclusion, that the Essence of Matrimony consists solely in the Bond, form'd by the sole Consent of the Contractants: *Essentialis natura Matrimonii est nodus & vinculum quo personæ sibi mutuo se tradunt.* And he reports out of *St. Thomas*, that Consummation is but an accidental Perfection

Perfection of Marriage; he proves it, because *Consensus animorum* alone is the Sign of Grace conferr'd in the Sacrament. Since therefore neither Consummation, nor the Power of consummating, can be Signs of Grace; and since no one can think otherwise without Impurity, why should it not be taken for granted, that the essential Character of the Sacrament of Christian Marriage is its Indissolubility? and consequently, 'tis unlawful to wipe away this sacred Character by casual and deceitfull Proofs.

There are, say they of the other Side, in the Sacrament two Characters to be consider'd, its Indissolubility and its Holiness; if Complaints of Impotency may endanger its Indissolubility, the Marriage of an Impotent inevitably sullies its Sanctity. The more venerable Marriage is, the more dreadful the Prophanation of it is by an Impotent, the more Care ought to be taken that the Remedy may not become impracticable.

What Sophistry! what Illusion! 'Tis just as if we should say, the more venerable a Sacrament is, the more holy it is, the more Facility and Complaisance ought there to be in dissolving it. We must be timorous how we prophane a Sacrament, in confirming of a Marriage; but we must
not

not be so fearful how we profane a Sacrament, in destroying of a Marriage. Blessed Reasoning, this !

The Sacrament of Matrimony is holy : All Sacraments are holy : Sanctity is an Attribute common to them all ; but the specifick distinguishing Attribute of this, is Indissolubility. The more venerable it is, the more holy it is ; the more scrupulous, exact, and severe ought we to be when People go about to dissolve it. Of all Prophanations of Sacraments, according to the real Mind of the Church, there's none more scandalous, more terrible, than a rash and too easy Dissolution of Marriage.

Let us suppose an old Man on the wrong Side of Fourſcore, fancying he felt in himself an Aftermath, a latter Spring of Youth ; flatter'd with this Titillation, (a sham Spur) he undertakes a Girl of eighteen or twenty ; this young Creature, *vivi nescia*, nay, if you will, as ignorant of Man as Madam *de Gesvres* pretends to be, and like her believing, (if she does believe it) that having been before the Priest, and receiv'd the Benediction of the Church, was enough to make them Man and Wife, and that all Men and all Ages were alike ; let, I say, this young Person pass whole Nights by the Side of this old Man, this breathing *Caput mortuum*, would not such a Conjunction
bear

bear an Affinity with this pretended Prophanation, which sticks so in the Gizzard of *Madam de Gesvres*? And yet no Man will dare to say, that 'tis lawful to have any Regard to the Complaint of that young Person, and grant her a Dissolution of her Marriage, nor even a Separation from her Husband.

Adultery, either on the Husband's Side, or the Wife's, does questionless yet more deserve the Name of Prophanation; whichever of them commits it, gives the other an Example, and sometimes an Opportunity, of being reveng'd. And yet the Prophanation, by Adultery, would be no Cause of Dissolution.

Would an Impotency, occasion'd by some Accident after Marriage, cause the same Danger? Would not the Wife continue all her Life, or her Husband's, in the same scrupulous Condition? But the Church would make a much greater, to untye her Bond, and destroy the Marriage.

Do People really believe, that the Church was less sage and less just in the twelve first Centuries of her Discipline? Was she less knowing wherein consisted the Prophanation of a Sacrament? Was she ignorant, that there may be Impotents, and that there actually are? Why then does she reject such Complaints, either of the
Wife

Wife or Husband? 'Twas because she was perswaded, that there was no Prophanation so much to be dreaded as that of a Dissolution; no Proof more faulty, more suspicious, more perilous, than that of Impotency; and that it was better, either by Way of Precept or by Custom, to reduce the marry'd Couple to live together like Brother and Sister, than to suffer them upon such Proofs to be parted; which remains to be treated of in the Examen of

The Discipline of the Church. First Period.

How dare People affirm, that in all the Ages of the Church, the Dissolutions of Marriage, for Cause of Impotency, were Part of the Ecclesiastical Discipline? 'Tis confess'd, they venture that false Proposition without Proof; but then they think to make it up by Subtilties and Sophisms.

Before the Time of St. Gregory, say they, the secular Power took to it self the Cognizance in Causes of Marriage; but scarce was the Church-Discipline at Liberty, when, by the Mouth of St. Gregory and of Gregory II. she declar'd two Marriages null for Impotency. They go on and say, they have quoted those two Examples to Monsieur de Gesvres's Advocates, and yet they're incorrigible!

What

What a Corrector! he has been already answer'd, that tho' in the Church's first Ages, when the Propagation of Christianity was not as yet universal, and when the Heathens were mingled with the Christians, the secular Power had its Laws; yet the Church did not depart from hers. He might have learnt from the two greatest Doctors of the Latin Church, [St. *Jerom* and St. *Augustin*] that the Laws of the Emperors were contrary to the Gospel, and that St. *Paul* forbade what *Papinian* allow'd of. The Christians, in Cases of Marriage, did not rely upon those Laws, which were the Offals of Paganism; they address'd themselves to the Bishops or Popes, who, instead of giving into the dangerous Snares of the Complaints of Impotency, dismiss'd alike the Husbands and Wives, and sent them Home again to live in a Christian-like manner as Brother and Sister, if they could not live conjugally as Husband and Wife.

As for the two Examples; he who for unjustly complains of being forgot, forgets himself, that Answer has already been made him, both verbally in Court and in Writing; that as for the Canon *quod autem*, he might see by the Observations of the *Roman* Correctors, and of M. *Pithou*, that it is falsely attributed to St. *Gregory*. The Gloss observes, that this Canon is taken

ken from the *Lombard-Law*, which is in the *Capitularies*.

As for the other, taken from the *Canon Requisisti*, which *Gratian* falsely ascribes to *St. Gregory*, and which the *Advocate of Madam de Gesvres* gives to *Gregory II*, *M. Pithou* speaks of it doubtfully: *Fortè Gregorio. II.* 'tis a Text, which, properly speaking, has no certain Author at all; and which, if we judge of its Doctrine by that of Chap. *Quod proposuisti*, ascrib'd to the same Pope, well deserves to be disown'd by all.

We need only see the Gloss upon this last Canon, the Observation of the *Roman Correctors* and of *M. Pithou* to make a Judgment of it.

If he who upon such Examples reproaches, in a Doctorial Tone, the *Advocates of Madam de Gesvres*, that they are incorrigible, has nothing better to propose, what a Corrector is He!

Take another Taste of his Wit: He would prove the Discipline of the first Period by that which he pretends to find in the second; confounding the two Periods, and advancing, *That the Body of Discipline has always been the same.* It is impossible, says he, that *Discipline which depends upon a Dogma*, should receive any Alteration, because the *Immutability of the Dogma which governs it*,
suffers

suffers it not to vary. The Church could not adds he, sometimes approve, sometimes condemn the Marriage of an Impotent; nor consequently sometimes admit, sometimes reject the Complaint for Impotency.

Is it prudent to propose such a Paradox in an Ecclesiastical Court? Is it to be imagin'd, that the learned and worthy Judges who compose it, should thus confound Doctrine with Discipline? The Difference whereof was so well understood in those early Times, that *Irenæus* says of the Variation in Discipline, that it makes the Unity in Doctrine more esteemable: *Varietas Disciplinæ unitatem fidei commendat*: And *Tertullian*, that with a Salvo to Uniformity in Faith, all that is Disciplinary is subject to Variation and Correction. *Lege fidei manente, cætera Disciplinæ & conversationis admittunt novitatem correctionis?*

Let us not confound Doctrine with Discipline: There needs no Sophistry here. Where is *this Dogma* written, to which they imagine the Discipline is fasten'd? We find a Dogma very plain, and very general in the Gospel, which forbids Man to separate what God has join'd together; but we find none there that speaks of an Impotent's Marriage.

To declare Impediments of Marriage, is a Thing which the Church has decided to be

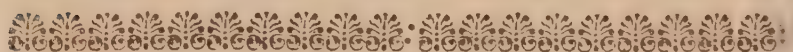
be Part of her Authority ; the Discovery and Proof of such Impediments are therefore the Workmanship of its Discipline.

The Church, in the first Period of its Discipline, did not think fit to receive Complaints for Impotency, because she would not expose the Indissolubility of a Sacrament to the Levity or to the Collusion of such Complaints, and yet less to the Peril of conjectural and casual Proofs. And we may say, (after the great Men who have worthily executed the publick Ministry in our Tribunals) that 'tis in those first Ages we may more assuredly find *the salutary Connexion between Discipline and Doctrine.*

People must not therefore say, that *the Church might sometimes admit, sometimes reject Complaints of Impotency.* The Church might do whatever she thought was a Part of her Discipline. Did she receive in that first Period the Complaints of Impotency ? 'Tis a Point of Fact ; and can we desire a better Proof of a negative Fact, than the Testimony of the Church herself, reported in the Canons : *Romana Ecclesia consuevit judicare ut quas tamquam uxores habere non possunt, habeant ut sorores.* Consuevit, it was the Custom, the Usage, the Discipline, attested by the Church herself.

Discipline .

The Discipline: founded upon this grand Principle, that where there was Doubt, we should stand by the Indissolubility of the Sacrament; or, to speak better, that we should not expose the Dignity of a Sacrament to a Conjecture, and to a Doubt: A Principle evident in it self, and yet more evident from the Observations which the Discipline of the second Period furnishes us with.



Discipline of the second Period.

TO have the Pleasure to say, that the Author of M. de Gesvres's Memorial would set up for a new Doctor, Reformer of the Church's Laws, wiser than the Canons, more zealous than the Popes, &c. they make him say whatever he did not say; but answer to nothing that he did say.

We are made to say in the Memorial of the Marquis de Gesvres, *That there's nothing but Scandal and Impurity in the Discipline of the Church.* All the Answer is of the same Strain and Style.

A Calumny which every Reader will acquit us of, if after he has read 10 or 12 of the first Pages of the Answer, he will please

please to give himself Time to read again, in the *Marquis de Gesvres's* Memorial, the whole Section of the second Period from about pag. 12. to about pag. 20. he will not find one Word that borders upon those wicked Sentiments which are father'd on us; and we are bold to say, that a second reading of the Memorial in that Place, will serve for a Reply to all the Artifice of the Answer.

The Publick will give me leave to call it an Artifice, which, by an artful Turn, attempts to confound the different Cases, which we had taken Care in the Memorial to distinguish as the Decretals distinguish them.

Madam de Gesvres makes a mighty Pot-ther with the Decretals, as if they had all receiv'd the Complaints of Impotency, tho' in some the Church absolutely set them aside; as in the Chapters *Consultationi*, of *Lucius III.* and in that *quod sedem*, of *Alex. III.* tho' there the Question was about a manifest Impotency occasion'd by visible bodily Defects. In others, the Church admitted no Proof, but from evil Conformation, as in Chap. *Accepisti*, and in Chap. *ex Literis*. In others, the Church allow'd of no Proof but the Husband's Oath, *Standum judicio Mariti*, as in Chap. *Si quis*, in Chapters *Accepisti* & *Continebatur*. And if
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in others, the Church was more indulgent to human Weakness, more easy to listen to the Complaints, and receive the different Proofs, she found by Experience that she was oftentimes deceiv'd : *Cum appareat Ecclesiam fuisse-deceptam.*

But what the whole Art of the Answer cannot colour or excuse, he passes in Silence those grand Rules which run through all the Decretals, and which in the midst of the Alterations of Discipline, have still preserv'd the immutable Principle of the Doctrine.

First Rule: That whatever Proof be admitted, whatever Judgment be pronounced in a Cause of Impotency : *De talibus Fucum pendeat ex futuro: sententia contra matrimonium lata non transit in rem judicatam.* The Judgments were never other than provisional and conditional, that if the Parties had not set forth the Truth, if they had impos'd upon the Church : *Si reus perjur. Inveniaris: cum appareat Ecclesiam fuisse-deceptam,* the Judgment was to fall to the Ground. The Parties who had so abused the Church, were oblig'd to break their new Engagement, the Husband to quit his new Wife, the Wife her new Husband, and to return again to each other : *Ad priora connubia redire, priora matrimonia restantur.*

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The Church, always sage, always equitable, might believe, that in Time these Menaces against false Swearers, the Abhorrence of shamefully resuming their first Tye, and of breaking the second, of returning to a Spouse justly offended, might be capable to prevent the Lyes, the Calumnies, the Collusions, and the Frauds, which the Church ever fear'd in Occasions of Impotency. Keeping in Sight the Doctrine which she held from Jesus Christ, *the Indissolubility of the Sacrament*, she acted not without Reserve, and granted not her Judgments but under Conditions.

Second Rule: That in these Causes, Presumption was always for the present State; Matrimony had always the better End of the Staff: *Standum pro Matrimonio*. Hence it follow'd, that when the Business was to preserve the Sacrament in Force, they believ'd neither of the marry'd Couple: *Contra matrimonium non est credendum eorum confessioni, & si uterq; confiteatur non est eis credendum, ne in fraudem hoc diceretur factum*. A Maxim, which plainly evidences how distrustful, even in the Discipline of the second Period, the Church already was of the Fraudulency of those Complaints, and yet more of the Uncertainty of the Proofs.

Third Rule, founded upon the same Principle with the foregoing : That between two Kinds of Proofs, either obscure, or different, or opposite, that which tends to preserve the Marriage ought to prevail because of two Inconveniences, to continue the Marriage, or to destroy it, the latter is certainly the most pernicious, and most contrary to the Doctrine of the Church and whatever is said by the Council of the other Side, we cannot repeat it too often *tolerabilius est aliquos contra statuta hominum dimittere copulatos quam contra statuta divina legitime conjunctos separare.*

In vain does the Answer laugh at these Words; *contra statuta Dei, contra statuta hominum* : This Rule is perfectly well apply'd here. The Impediment of Marriage on Account of Impotency, and its Proofs depend upon the Discipline of the Church in like manner as the Impediment for the Cause of Kinship, and its Proofs, (spoken of in the Chapter where that Letter's written) in like manner, I say, as that Impediment, and its Proofs, are Part of the Ecclesiastical Discipline. The Law of God is the Indissolubility of Marriage, *statutum Dei*; the Impediments of Marriage, are the Discipline of the Church, *statuta hominum*; 'tis therefore better, according to that Rule authoriz'd by the fourth Lateran Council

Council, to venture the preserving a Marriage, *contra statuta hominum*, than to dissolve it, *contra Dei precepta*.

Thus, as for what concerns Proofs in general, you see what Fruit may be reap'd from the Texts and Glosses of the Decretals.

As for the particular Proof by inspecting the Wife, it will be the Subject of the second Part. We shall content our selves (rather than divide the Observations which regard the Decretals) with replying to the groundless Aspersions which are cast upon the Author of the Memorial upon Chap. *Littera* and Chap. *Proposui* *fi*.

As for Chap. *Littera*, we did indeed cite it with Respect to the Proof of triennial Cohabitation; and we did not believe, that Madam *de Gesvres* could, in Relation to Inspection, gather any Advantage from a Text, which instead of clashing with our Principles, confirms 'em.

The Analysis of that Chapter, is this: A Man and Wife had liv'd together as marry'd Folks for eight Years; the Wife set forth, that after this long Cohabitation she was still a Virgin; *Eo quod vir ejus non habebat potentiam coeundi*, and so she desir'd to be divorc'd.

The Husband own'd, *quod illam nunquam cognoverat*, that he had not consummated
K 2 with

with her; but that he was able to consummate with other Women.

The Bishop, who consulted the Pope, said that he had caus'd the Wife to be inspected by Matrons, who reported that she was a Virgin. The Bishop, by another Sort of Precaution, which doubtless will seem extraordinary to us at this Time, appointed the Curate of the Parish where the Husband liv'd, to make Enquiry whether that Man who alledg'd he was potent and capable to consummate with other Women had had carnal Commerce with any other Woman; and by the Inquisition of the Curate it could not be made out clearly, that he ever had had such Commerce with other Women.

Things standing thus, the Wife clamouring to be divorc'd, and blubbering *that she would be a Mother, and would have Children*, the Husband, on his Side, said he referr'd himself to the Church; *quod preceps erat stare Consilio Ecclesie*. The Bishop enjoyn'd both of 'em to undergo Penance, in order to obtain from God, through their Prayers, *ut opus matrimonii consummarent*. In short, after many Put-offs, the Husband and Wife return'd to the Bishop and unanimously declar'd to him, *consona voce*, that they could not carnaliter consummari.

Upon

Upon this, the Pope answers the Bishop, that if it appear'd to him, that in the Course of those eight Years, the Husband and Wife remain'd together *per continuum triennium*, he may, after taking an Oath from both of them, that *commisceri carnaliter nequivisse*, and added thereto the Inquest, *septimæ manu*, pronounce a Sentence of Divorce between them.

Now, to speak sincerely, what Use can this be of to Madam de Gesvres, in the worshipful Court we're now in, and in the Age we live in?

1. The Husband confess'd he had never conjugally known his Wife. He alledg'd, he was impotent towards none but his Wife; that it was but a partial Impotency, and that he was capable of knowing other Women carnally. Does not this Discourse of a Husband and Wife, after eight Years cohabiting, discover a manifest Collusion?

2. The Bishop said he had caus'd the Wife to be visited by Matrons. Is it not plain from the Texture of this Collusion, that the Husband, instead of opposing it, consented to't?

3. The Inquisition of the Curate in his Parish, to find out whether the Husband had had Commerce with other Women, is a Piece of Management upon which, out of Respect to the Decretals, we ought to for-

bear Reflexions. But is it not visible, that the Husband, who had colloqu'd with his Wife to get themselves parted, would have been very sorry, could the Inquisition have furnish'd any Proofs of his Ability?

4. The Sequel clearly demonstrates it. The Wife returns, and teizes the Bishop and the Husband, owning his Feebleness; says, *That he's willing to leave it to the Church*; that is, in plain *French*, he consents to his Demand; and, at length, they both declare *consonâ voce*, that they have not been able to consummate. Can there now seriously be any Notice taken of this Example?

As for Chapter *Proposuiſti*, it is needless to repeat what has been said in the Memorial, back'd by the Sentiment of the Doctors, who have testify'd, not by a random Guess, as *Madam de Gesvres* is made to say in her Answer, but by a well-grounded Argument, *That this Letter ought to be understood of a Woman who had a Mind to be a Nun.*

And indeed the Doctrine of this Chapter (if we go about to understand it in a Case of an Accusation of Impotency) would be (as is shewn) contrary and repugnant to the Direction of the other Decretals, and to all the Principles laid down by the other Popes; and nothing better shews what little Weight ought to be given to this Chapter, than the Necessity wherein all the Doctors

Doctors have found themselves, (in order to justify or excuse the Decision of it) viz. to believe that it was in a Case that was special, and which favours the Interests of Religion.



Latter Condition of the Church's Discipline.

THE Discipline of the Church in the first Period, when it was nearer the Source of its Doctrine, look'd upon Indissolubility as a Law so sacred, that, not to expose herself to the Hazard of violating it, she made it a Rule to herself, that it were better to oblige the marry'd Couple to dwell together, like Brother and Sister, than to separate them. A general Rule doubtless, for the Wives as well as the Husbands. As for the Difference suggested in the Answer, between the Condition of the Husband and that of the Wife, it is frivolous; the Rule were wrong, if it were not equal; and it would be accusing the Church of Injustice, to impute to her the making a Law between marry'd People, which should be against one, and entirely for the other.

The Discipline of the second Period has pass'd, by Degrees, to the opposite Extremity ; looking upon provisional Judgments and conditional Dissolutions, as a Means to repair the Mischief if in Time the Church should find herself deceiv'd ; they were indulgent to human Weakness, they were accessible to Complaints of Impotency, and easy in the multiplying of Proofs. The Church perceiv'd the Inconveniencies thereof ; she was sensible of the Mischiefs she at length apply'd a Modus and a Remedy, in the present Condition of her Discipline.

In this latter Condition, she is not indeed return'd to the holy Severity of the first Period ; but she is greatly departed from the dangerous Facility of the second : She has establish'd two Maxims, which ought to be inseparable from each other.

The first, that in Actions of Impotency, they no longer allow of those provisory Judgments, nor those conditional Dissolutions, which had been the Source and Excuse of the Facilities of the second Period.

The second, that as Judgments ought to be definitive, (as they are in Truth) and as thereby the Husband that is convicted of Impotency, is forbid marrying any other Woman, and on the contrary the

Wife

Wife is allow'd to take another Husband; there must be, in order to dissolve a Marriage on Account of Impotency, real, physical, certain, and infallible Proofs. This makes the Subject of the

Second PART.

Wherein Answer is given to the System of moral Proofs, and to the particular Proof resulting from Inspection; shewing that moral Proofs have nothing to do in Questions of Marriage; and that besides, the Inspection of the Wife is neither a moral Proof, nor even a juridical Proof.

MAdam de Gesvres distinguishes two Things in Virility, namely, its Cause and its Effects. She places the Cause of Virility in the Man; its Effects she places in the Person of the Wife.

According to her, to look for Virility in the Person of the Husband, is looking for a Needle in a Bottle of Hay: If he gives Tokens of Motion, that concludes nothing as to Ability; because Motion, in whatever Degree it appears, may be a deceitful Motion: If he gives no Token of Motion, that may create a Jealousy of his

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Inability;

Inability; but it does not evince it; because habitual Motion may be without actual Motion: *A non erecto ad non erigibile non datur consequentia.*

With this Impossibility, which she pretends to labour under, of finding nothing in the Person of the Husband that may determine it, she takes upon her to look for the Indications of Virility in the Exameen of its Effects. This is the Plan which is laid down for her in the last Plea.

'Twas such a Proposition as this, which first led People to the Tryal of the Congress; and indeed this latter Proof was introduc'd to seek for Virility in its most immediate Effect; nay, it was both more perfect in its Comprehension, and more certain in its Indication: More perfect in its Comprehension, because it may be common for all Women alike, whether Virgins or no Virgins: More perfect in its Indication, because Non-consummation in the Act of the Congress, may probably enough be ascrib'd to the Want of Power, whereas simple Non-consummation may proceed from Want of Will.

Madam *de Gesvres* however does not go to that Length. Curb'd by a Regulation which she could not attempt to break thro' in so open a Manner, she is forc'd to elude:

elude it, by proposing to look for Virility by inspecting the Wife's Body.

Not that she pretends, that this Inspection is a demonstrative Proof of Virginity, or that Virginity is a demonstrative Proof of Impotency; but she pretends, that Virginity is capable of a moral Certainty, and that it is at least a moral Proof of Impotency.

The Upshot of her Memorial, is, that in Judgments it is not requir'd that a Proof be physical and infallible; that they're content with a moral Proof; that this is plain from Examples of Racking, and of a Man's being found with a bloody Sword standing by the Body of another newly slain, &c.

The Marquis *de Gesvres* owns, that these Proofs are Proofs simply moral; that they are however admitted in criminal Affairs; but he maintains, that this is founded upon particular Reasons, which are not to be met with in Questions of Marriage.

In criminal Matters, there is a written Body of Laws; this Body specifies what is a Crime in general, and points out the Guilty. The Function of the Proof in this Case, is only to apply the general Indication to a particular Person.

In the Business of Marriage, there is a Fact of Impotency laid down; nay, 'tis the Fact of Impotency which is look'd for.

What is sufficient for the Proof of a simple Indication, is not sufficient for the Proof of a Fact.

'Tis not the Marquis *de Gesvres* says that 'tis the Law which declares it, in the Article where it ordains, that if there's a considerable Proof against one that's accus'd of a Crime that merits Death, and which is manifest, the Judges may put him to the Rack; for according as the Case is, 'tis sufficient or an insufficient Proof: A considerable Proof is enough, when the Crime is manifest; and it is not enough, when the Crime is not absolutely certain.

It is true, there are Accusations where the Law is not clear; and then the Proof requir'd, is always a moral Proof. But this Usage in criminal Matters is founded upon divers Circumstances.

These Circumstances are to prevent Crimes by Menaces, to stop the Career of them by Examples, to maintain, by this Means, the Order and Quiet of the Republick.

Menaces are needless, when Men can avoid 'em. As the most profligate Wretches might live in that Liberty, if nothing but Demonstration could convict them; they

they need do no more than offend in secret, and render their Crimes imperceptible to Evidence: There was a Necessity to obviate such an Inconvenience; and it was the indispensable Necessity of obviating it, which forc'd the Laws to descend to the Use of moral Proofs.

Not but that this so defective a Proof has been look'd upon as pernicious; but it was more so to be ty'd down in this Point to demonstrative Proofs. It had been to procure Impunity to Villains, and to sacrifice the publick Repose to their Enormities. Reason of State has prevail'd; and it has been thought more just, that one innocent Man should run the Risk of his Life, than the Welfare of all should be in Danger.

There's nothing like this in Questions of Matrimony. The Fact of Impotency, now in Debate, is neither an arbitrary Fact, nor a Fact susceptible of Imitation: The Example of one impotent Man does not excite others to be so too; nor is it a Fact wherein the general Welfare is concern'd; it is on the contrary a Thing very indifferent to the Publick, whether a certain Man is impotent or not; the Contest mov'd upon this Head, is a Contest between one private Man and another private

vate Man, in which none but the Partiess themselves are interested.

'Tis to no Purpose to say, that the Example of one Impotent, who is marry'd, may be drawn into Consequence for other Impotents; for the Difference is infinite. The Example of a Crime is dangerous, because there's a great Number of Persons capable to imitate and follow it; but the Example of an Impotent's Marriage is not to be fear'd, because the other Impotents are few in Number, *Cura vix aliquis inveniatur impotens ad coeundum.*

There is therefore neither Reason of Foresight, nor Reason of Example, nor Reason of publick Good, to oblige us to trust the Fact of Impotency to the Uncertainty of moral Proofs; there is, on the contrary, a very considerable Motive not to depend upon it, a Motive founded upon the very Nature of that Proof.

Moral Proof is a Probability, which carries along with it necessarily, and in its own Nature, the Possibility of an oppos'd Fact; its Character consists in leading him that uses it, either to Truth, by the Way of Probability; or to Error, by the Way of absolute Possibility.

Thus, for Example, in Search after a Crime, it leads the Judge, by the Way of Probability, to punish the Guilty, or con-

ducts

ducts him, by the Way of Possibility, to punish the Innocent.

And yet the Judge walks in this second Path rationally and lawfully.

Rationally; for he undertakes nothing but what is absolutely practicable, forasmuch as an innocent Man is a possible Subject for undergoing an unmerited Punishment.

Lawfully; because the publick Necessity authorizes him to repute guilty the accus'd Man, who is convicted according to the Forms.

Moral Proof would lead by the same Ways the Judge that takes Cognizance of Impotency; he may as well err as go right.

If he treads in this second Path, Possibility, his Conduct would be at the same Time absurd and criminal.

Aburd; because it would tend to dissolve a lawful Marriage; that is to say, tend to an End impossible in it self; the Dissolution of a valid Marriage being *de impossibili*.

Criminal; because it tends to dissolve what God has render'd indissoluble, to do what the divine Word has forbid: *Quos Deus conjunxit homo non separet*.

The Judge who sits upon criminal Causes, may conduct himself by moral Proofs, because

cause in running a Venture to be deceiv'd, and of putting to Death an innocent Man, he runs a Venture of what is possible in it self, and lawful in him: But the Judge who sits upon matrimonial Causes, cannot conduct himself by moral Proofs; because in venturing to be deceiv'd, he runs a Risk of dissolving a legal Marriage; because in risking to dissolve a valid Marriage, he would run a Risk of attempting what's impossible, and of doing what's forbid.

We must therefore in this Particular have Recourse to the Rules of common Reason.

'Tis a Jest to refer these Rules to simple Speculation; to say as *Madam de Gesvres* does, that truly these simple Speculatives determine themselves, and judge only by Evidence; but that they may likewise dispense with judging in a certain Point: It is not the same in judicial Proceedings, where the Judge is oblig'd to give Judgment; for it is very true, that in judicial Proceedings the Judge is oblig'd to give Judgment. The Judge, who sees clearly the Equity of the Demand, pronounces and passes Judgment to the Benefit of the Demander; but the Judge, to whom the Demand is not sufficiently made clear, hesitates, stops, and pronounces, *sibi non liquere*; which is as much as to say, he has not Evidence.

dence enough to pass a Sentence; *Ex non probatis jus fieri non possit.*

This is true, especially in Matters of Marriage, where the Judge, who plainly perceives the Impotency, is oblig'd to give Judgment and decide, *Matrimonium non fuisse.* But the Judge, who does not so plainly perceive the Impotency; the Judge, who conceives nothing of it but Doubts or Imaginations, is not oblig'd to pass Judgment; on the contrary, his Duty in this Case is to hold his Hand, and not to meddle in a Marriage, the Nullity whereof he does not evidently see.

It is true, the Proofs introduc'd by the Canons have not this Evidence; but it is likewise as certain, that they were not intended to conduct the Judge to pass a definitive Sentence upon a Nullity of Marriage; the Strength of such Proofs was bounded by the Canons to produce provisional Decisions, where the Officer does not pass Judgment, but only decides according to the Weight of the Probability.

The Use of these Sorts of Proofs would be less intolerable, if Madam *de Gesvres* would refer herself to the ancient Practice of the Church; if she had form'd her Demand without Prejudice to the Right of the Parties in the first Instance; if she had demanded the Dissolution of her Marriage
only

only by Way of simple Provision: But she demands purely and simply, that her Marriage should be declar'd null; she insists upon having the Liberty of marrying another Man. Such a Demand cannot be allow'd of, unless the Judge is convinc'd by the Evidence, that there is a Want of Virility.

And here it is, that *Madam de Gesvres* loses herself; she is very sensible, that her Strength does not lye in good Reasoning, and so she has Recourse to Exclamations, Tropes, and Figures; she intrenches herself, if we may so say, in the pretended Horrors of an Impotent's Marriage, by saying, that in Questions of Impotency the Judges walk in a Path between two Precipices, Dissolution of a Sacrament on one Side, and Prophanation of it on the other.

'Tis hard to conceive what *Madam de Gesvres* would insinuate by such Discourses. If she means, that the Marriage of an Impotent is an habitual Prophanation of a Sacrament, we answer her from the Usage of the Church, who counsels, according to her, and enjoyns, according to us, the marry'd Couple not to separate; we answer her from the Canonical Dispositions, which refuse to listen to the Wife, who was acquainted with the Impotency before the Marriage.

Marriage, Chap. *Consultationi & de frigid. & malef.* Will she dare to accuse the Church of having consecrated by peremptory Decisions the Prophanation of an august Sacrament?

If she says, that the Marriage of an Impotent is a Cause or Occasion of the Prophanation, thro' the Danger to which it exposes the Person who complains, we say, that the same Abuse may happen in the Marriage of a Man that is not impotent.

And indeed this Abuse does happen, when a natural Aversion, or the Love of another Woman, makes the Husband less assiduous in the Duties of his Condition, or when an excessive Rampantness puts him upon over-doing the Duties of the conjugal State: In the first Case, the Wife is expos'd to his own Feebleness, the last exposes her to Enterprizes Abroad.

The most sacred Things are capable of being abus'd; 'tis the Abuse that is criminal, and not the Thing abus'd. The Conduct of the Husband just now describ'd, is a Prophanation, of which Marriage is the Occasion; but this occasional Profanation does not hinder Marriage from being a lawful Conjunction.

We may say the same of the Marriage of an Impotent, The marry'd Couple may abuse it; but this Possibility of Profanation,

tion, which besides has its Remedy, either in the Piety of the Husband, or in the Vertue of the Wife, or in the Right she has to reject his empty Caressings; this Possibility of Profanation, I say, makes nothing against the Marriage of an Impotent in itself, nor against the Wisdom of the Decisions which injoin the marry'd Couple to let the Marriage subsist.

'Tis therefore a false Figure Madam *des Gesvres* makes Use of, when she describes a Path hemm'd in with two Precipices; there is no Precipice on the Side which preserves the Marriage of an Impotent in Force; 'tis a beaten Road, fortify'd by the canonical Dispositions. The Precipice is on the Side of those who would have Marriage dissolv'd upon moral Proofs; for they would have that dissolv'd, which is indissoluble, and separate those whom the Church declares inseparable.

A Danger of this Nature cannot be hazarded; People may absolutely tread in the Path which leads to Dissolution; but it is not lawful to direct their Steps thither by the obscure uncertain Method of morall Proofs. In this Point there is no true Light, but that which springs from Evidence it self.

The Inspection of the Wife has not such Evidence; Madam *de Gesvres* is forc'd to own it; another Thing must be establish'd which

which she does not grant, namely, that such Inspection is neither a moral Proof, nor even a judicial one.

As to this Proof, *Madam de Gesvres* calls to her Aid two Sorts of Authorities; the one, such as admit of the Inspection simply; the other, such as speak of it as a sure Proof.

It is true, since you will have it so, that the canonical Dispositions do admit of inspecting the Wife; but it is likewise true, that those same Dispositions do admit of the Oath of the Husband, the Depositions of Neighbours and Kinsfolks, and orders by Way of Fore-Tryal the triennial Cohabitation.

Madam de Gesvres does not receive, as a moral Proof, either the Oath of the Husband, or the Testimony of the Kinsfolks, and objects to the Custom of triennial Cohabitation.

In this surely *Madam de Gesvres* does not pretend to set up for a Reformer of the Church's Laws, nor to fancy herself either wiser than the Canons or the Popes, or more enlighten'd than the Canonists. She only bends herself to examine these Proofs in themselves, independantly of the Authority of the Dispositions which admit them. *Monsieur de Gesvres* does no more,

more, when he sticks to judging of the Inspection by the Examen of its Certainty.

It is upon this last Point, that Madam de Gesvres repeats these Terms, *Hostiensis probatio ad oculum alias vincit*; those of Innocent IV. *Non est melior probatio secundum Canones*; and those others of Henry Bobicus, *Probatio per aspectum corporis, quæ ad cognitionem carnalem aliis præfertur*.

If there were any need to combat these Authorities, by contrary ones of greater Weight, it would be sufficient to oppose to them the peremptory Text, which declares the Uncertainty of such Proof, *Oculus & manus obstetricum sæpe falluntur*; as likewise the Decision of the Rota, viz. *Probatio per inspectionem est fallax & lubrica*.

But when we speak of any other Proof, the Authority is not considerable, but in one Case, namely, when the Persons speaking of it are capable of judging of its Certainty.

The Canonists would be so capable, were the Certainty of Inspection a Thing that could be judg'd of, either from the Light of natural Reason, or from Notices suiting the Purity of Priesthood.

Madam de Gesvres does not pretend that Inspection is of this Kind; she says herself, that the Official cannot determine what Degree of Certainty the Tokens of Virginity

do

do produce; that he cannot enter upon such an Examen, without contaminating the Purity of Priesthood; that it would be to no Purpose to enter upon it; that it is beyond his Capacity: She does not except even her own Counsel, whom she makes to say, that neither he nor the Judges are capable of knowing wherein the Certainty of the Art may be exceptionable.

What *Madam de Gesvres* says of the Official, may with as much Reason be said of the Popes and Canonists; the Maxim she advances, may be apply'd equally to them; namely, that, in order to judge of the Degree of Certainty produc'd by Inspection, a Man must be something more than a Casuist.

This other Capacity is easy to be guess'd at; 'tis a Capacity of Acquisition, resulting from Study and Experience; a Man must be a Master of the Craft.

Upon this Foot, the Physicians and Chirurgions, the Anatomists of all Ages are the Men we must consult, whether Virginitie is cognoscible, or not; whether 'tis possible to judge certainly that a Maiden-head has been broke up.

Madam de Gesvres does not consult indifferently all those whose Opinions offer themselves in Books; a happy Delicacy does at once rid her of all those who make against her, and she's shock'd at their very Names.

Names. *Don't believe,* says she, *that we'll have Recourse to a Pack of Physicians with hard Names, to be decided by them.*

This Pack, whom *Madam de Gesvres* cunningly avoids, is however a Pack she finds in her Way; in refusing to abide by them, she, at least, owns she has met with them; she thereby acknowledges, there are great Numbers of Physicians, Chirurgions, Anatomists, all Professors of the Art, and who declare, that there's nothing but Uncertainty in their Conjectures about the Existence or Non-existence of Virginity.

If all Physicians and Chirurgions should say, that Virginity might be known, they might be mistaken; but it would, at least, be probable, that their Thoughts were right when they are so unanimous; because there would be on one Side Probability, on the other a bare Possibility of the contrary. This would be a Case of moral Proof.

Madam de Gesvres stands not upon this Bottom: She's forc'd to own, that there is a great Number of the Masters of the Art whose Opinion is against her; nay, that there were an equal Number for her, it would neither make it a Case of Controversy between Probability and bare Possibility, nor a Case of moral Proof; it would, on the contrary, be a Case of Probability, not of Probability, equal, and of mere Uncertainty.

But Madam *de Gesvres* does not pretend to have so much as the empty Advantage of an equal Number : The Indigence of Authorities confines her to *Zachias* alone, that is, to an Author who at first protests that Virginity has no Token, *Nulla dantur certa Virginitatis signa* ; who enters not into an Examen of the Indications, but on Purpose to confound it ; who concludes his frivolous Examen, by saying, that notwithstanding all he had been saying, some Judgment might be pass'd upon a Maidenhead, *nam mane virginitatis judicium ferre licebit*. To rely upon such a Decision, is neither more nor less, than to confess, that they have neither respective Probability nor equal Uncertainty on their Side ; 'tis owning that the Proof by Inspection not only labours under the Disadvantage of being incapable to be rank'd among moral Proofs, but likewise that it sinks to the Rank of the most uncertain Proofs ; and 'tis this Uncertainty, which even in the Introduction of the Congress we find a Testimony of.

And indeed this Proof was shameful, contrary to the Honour of the Marriage-State, to the Purity of Christian Manners ; it might not be admitted, but to remedy the Uncertainty of the others.

It was admitted into the Episcopal Courts ; it there subsisted for a Century, under the

Nose of the Sovereign Courts and their Authority. This Suffrage of all the Judges, this Harmony of all the Courts of Judicature, is exactly what may be call'd an open and fair Inquest upon the Inspection of Wives, and an authentick Declaration of its utter Insufficiency.

But it is not enough to have made it out clear, that moral Proof does not take Place in Matters of Marriage, that inspecting the Wife is not even a moral Proof; we must go thro' with our Work, and make them confess, that Inspection is not even a juridical Proof.

Juridical Proof is that which is either prescrib'd by Law, or admitted by Usage, to ground a Decision upon. Such are the Proofs quoted by *Madam de Gesvres*.

The Comparison of Hand-writing, for Example, gives Room for declaring the accus'd Party definitively attainted and convicted of Forgery. The Deposition of Witnesses, the Confession upon the Rack operates the same Effect.

The pretended Proofs of Impotency would be of the same Kind, were they receiv'd in the Tribunals to operate therein a Decision, were what is founded upon the Proofs look'd upon as prov'd in legal Form, and capable of passing for a Thing adjudg'd.

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But it is not so: Proofs of Impotency have indeed been admitted into Ecclesiastical Courts; but they have not been admitted as a Principle of Decision, nor as capable of leading to a Knowledge necessary for a definitive Judgment; they have been only receiv'd as an interlocutory provisional Principle, as capable of producing between the marry'd Couple a Separation, to subsist 'till the Virility can be fully made out. *Nisi postea appareat Ecclesiam fuisse deceptam.*

These Proofs would be juridical in this Sense, were they to be made Use of according to the Intention of their first Institution; but Things are chang'd, the Judgments are now definitive, the ancient Proofs are not juridical in that Sense, because they were not introduc'd nor admitted to found any such Judgment upon.

'Tis true, we are in a Court where those Proofs are admitted; but the Business is not to determine upon the ancient Usage of those Proofs, nor concerning their primitive Institution; the Business now in Hand, is to judge definitively of the Ability or Inability of *Monsieur de Gesvres*, to confirm his Marriage, or to declare it void for ever; this can't be done juridically upon Proofs, which were not introduc'd to found a Judgment of that Nature upon.

'Tis to no Purpose to cry, that Inspection is the last and sole Resort against Frigidity; for in that Sense the Congress was much more favourable.

We may say, in its Behalf, what Madam *de Gesvres* insinuates, that some defective Examples make nothing against a judiciary Proof; that these are only singular Failures in civil Order, as they happen sometimes in Nature; that such Irregularities prove nothing against common Order; that the Example of some innocent Persons condemn'd, has occasion'd no Change in the Proceedings against Criminals.

We may say, on the Behalf of all Women in general, that the Congress is the sole Means of knowing whether the Promises made by Motion are true or false; we may say, on the Behalf of the no-Virgins in particular, that they had in the Congress the only Means to make out the Impotency of Frigidity. We may add that extraordinary Decision of the *Rota*, employ'd by Madam *de Gesvres*, to insinuate that the Singleness of a Proof, brings a Necessity of making Use on't, which prevails above its Uncertainty. *Nec obstat quod cum probatio per inspectionem sit fallax & lubrica, non potest ex ea duci certum argumentum, quia cum in hac materia non possit dari alia probatio, ideo per*

per hoc genus probationis controversia dirimenda est.

These different Considerations did not hinder the Decree of 1677, which authorizes the second Marriage of the Lady *Lange*, which rejects the Congress, and which establishes two Principles; the first, that the Decisions which pass upon Questions of Impotency, are definitive, and must go for Truth; the second, which necessarily flows from the other, that in these Matters there must be full Proof, and that the Congress being look'd upon as defective from the Example even of the Party concern'd, ought to be banish'd from the Number of such Proofs as are capable of grounding such a Judgment upon.

This same Congress, which the Decree proscribes, was introduc'd as a Remedy to the Uncertainty of the Inspection; that is to say, as a Proof that was more sure; the Decree which rejects it for its less Certainty, must, *à fortiori*, reject the Inspection for its greater Uncertainty; and indeed so soon as in general 'tis made out, that moral Proofs may not be admitted in Questions of Marriage, so soon as 'tis in particular demonstrated, that Inspection is neither a moral nor juridical Proof, it follows, that it can never be admitted to ground a Decision so important as that which tends to

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pronounce irrevocably and for ever the
Dissolution of a Marriage contracted in the
lawful Forms.

Madam de Gesvres does however confess
that this same Inspection is her only Re-
source; 'tis acknowledging in her own
Despight, that she has no Resource at all;
'tis granting that the Regulation of 1677
puts her upon a Level with so many Wives
Non-Virgins, whose Resource is good, pro-
vided they stick to Conformation only.



Laſt P A R T.

Wherein is ſhewn, that ſince the Abolition of the Congreſs, the Reports have been made, and the Judgment paſſ'd upon Conformation alone; and the pretended Examples of the contrary, are anſwer'd.

WE have taken out Copies of ſix Reports made in the ſingle Officialty of *Paris*; that is to ſay, *le Page* in 1684, *Roger* in 1694, *le Bret* in 1703, *Damour* in the ſame Year, *Totin* in 1708, and *Grener* in 1710. In all theſe Reports, the Search

ers, upon the bare Inspection of the Organs, and the Examination of their interior Disposition, Figure, Dimension, Situation, without any Exhibition of Tokens, have decided for the Virility of the Husbands; nay, in two of these Reports, the Searchers, notwithstanding there was something wrong in the Conformation, did not hesitate to declare for Potency; we need only recite that of Grenet in 1710. It runs thus: *Have proceeded to inspect the Genitals of the said Grenet, and we find them in their natural Condition; yet we did observe, that the right Stone is larger and better condition'd than the left; as likewise, that the spermatick Vessels seem'd to be flabby, weak, and impair'd; which however may not absolutely prejudice Generation, only it may render it less frequent and more feeble; and therefore we think him capable.*

It is true, of these six Reports there are but four upon which the Officials have pass'd Sentence, and rejected the Wives Complaint; but it is evident, that if there's no Judgment at all upon the other two, it is because the Women, after the Report of the Searchers, have been sensible of the Unadvisedness of their Action, and dropt it, in order to recover their Husband's good Graces.

Let it not be said, that these Wives, whose Examples we point out, were not, or pretended not to be Virgins at the Time of their Marriage, and consequently could not propose their Virginity as a Proof superior to that of their Husbands Conformation.

For besides that in these six Examples, there are four of Wives marry'd when Maidens, who consequently might make Use of that Argument of Virginity; it's evident, to a Demonstration, that the Searchers in these six Reports govern'd themselves by Conformation alone: That they consider'd it as a Proof sufficient of it self, and which render'd all other Enquiry needless, as being the sole physical Proof which they could lawfully have Recourse to, now that the Congress is abolish'd.

We call Conformation a physical Proof, because it is according to the general Order of Nature, and fetch'd from the very Bosom of Nature's self.

The natural Parts of a Man having taken a Vegetation and an Increase equal and uniform with all the other Members which organize him, and this from Childhood to Manhood, it must necessarily be inferr'd according to the Laws of Nature, that she has supply'd the generative Parts with the same Life and the same Spirits which ani-

matee

mate his other Organs: In a Word, a Man conform'd, whose Habit of Body is not spoil'd, produces an Argument of his Virility, which he has in common with all compleat Men.

We likewise say, that 'tis the only physical Proof legally to be requir'd since the Proscription of the Congress; and we flatter our selves we have made it out to be so in the Memorial.

For, in a Man accus'd of Impotency, we may not look for more than perfect Conformation join'd to a Habit of Body.

As for the two Tokens hinted at in the second Part of the Report: The second is abominable out of the Act of Marriage. *Madam de Gesvres* was forc'd to own it.

The first Token, call'd Motion or elastick Capacity, must either be natural or procur'd; the natural is a Donation of the Fancy; there's no commanding the Fancy; the procur'd Motion is a Crime out of the Act of Marriage, according to the Doctrine of the Church, the Councils, and all Divines: Therefore since the Regulation of 1677, it may not be insisted upon, (in Questions of Dissolution of Marriage) that the visited Man shew to the Searchers those two Tokens; it would be reviving the Congress.

It is upon this same Principle, that in the said six Reports, the Searchers, from the Inspection of the Conformation, did pronounce in Favour of the Virility of the Husbands, because they conceiv'd they might not carry their Enquiry farther, and that to exact the two obscene Tokens, was to run counter to the sage Regulation of 1677.

They of the other Side do in vain endeavour to elude the Force of these Reports, by supposing that the Searchers might see what they do not express; that if they have not given an Account thereof, it was because they did not care to foul their Narrative with Circumstances equally offensive and superfluous: That moreover, tho' sole Conformation might govern the Searchers in those six Reports, it would not be conclusive, because the Conformation of one Man, is not the Conformation of another.

The Fallacy of these Ratiocinations is apparent, in Spite of all their Wit and Subtilty; every rational Man will argue thus. The four Searchers who drew up these six Reports, speak of nothing but Conformation alone; therefore they saw nothing but Conformation. They speak not at all of the two Tokens; therefore

fore those two Tokens did not appear to them.

Was it out of a Scrupulousness, and to avoid fullying their Reports by an offensive Detail? That's neither true nor likely. 'Tis visible in *Grenet's* Report transcrib'd in the preceding Page, that they who inspected him, did, as one may say, make an Anatomy of his Genitals in Terms capable of putting Modesty to the Squeak. The other Reports are no less plain; but the Masters of an Art ought to speak without Scruple the Language of their Art.

Had they seen one of those two Tokens, would they omit mentioning it in their Relation? Would it have been a superfluous Circumstance? Would it not have added more Weight to their Opinion or Decision?

Conformation of one Man, 'tis true, is not the same in another; Nature delights in Variety. Thus those six Men were not equal in their Conformation; nay, two of them had something amiss. *Grenet's* Defects are specify'd in the Report.

It is therefore evident, that when from these six several Organizations the Searchers did conclude in Favour of Virility, they did it because they govern'd themselves by the actual Condition of those Men at the very Time of their Inspection, independently of any other Sign of Potency; and that,
according

according to the System of those Searchers, it is now no longer allowable (since the Abolition of the Congress) to seek for other Proofs than what naturally flow from a good Conformation; and this Argument is common to all Men alike, because the Diversity that may chance to be in the Make of their Instruments, when they are not faulty either by Nature or Accident, can have no other Effect than to give a stronger or weaker Idea of their Capacity.

Farthermore, we may say, that taking the Thing as the four Searchers themselves have express'd it in the first Part of their Report concerning the Marquis's Conformation, it is represented to be full and perfect, and consequently they have left no reasonable Handle to doubt of his Virility; so much the more, since the indiscreet and damnable Curiosity of enquiring into the two obscene Tokens, could not be gratify'd without reviving the infamous Proof of the Congress.

Proceed we now to examine the present Practice of the Episcopal Courts, with Respect to the Inspection of the Wives, and the Examples that are brought against us.

It is no indifferent Thing to recur to the Beginning of Things. The Church and the Ecclesiastical Tribunals knew nothing of this scandalous Practice for twelve whole Centuries.

Centuries. Even the Church of *France*, tho' in the 8th Century she tolerated Complaints of Impotency, did not think, that Inspection of the Wives was a requisite Proof; the whole Dispute was determin'd, either by the Affirmation of the Husband, or the Testimony of Kinsfolks.

It was in the Decline of Discipline, when this infamous Proof was introduc'd. The Uncertainty and Fallibility of it was soon found out; and so it was thought the Congress might help it; thus one Abyſs calls forth another. The private Prostitution of the Inspection was not more indecent than the publick one of the Congress; they were both branded with the same Mark of Infamy and Uncertainty. At Length, Thanks to the Wisdom of the secular Magistrates, the Congress, which was only a Supplement to the Inspection, having been repeal'd, the Inspection fell under the same Proscription.

It is however granted, that the Inspection has been sometimes us'd in the Episcopal Courts since the famous Regulation of 1677. But we say and aver, that it was only in two Circumstances order'd by the Ecclesiastical Courts, and authoriz'd by the Sovereign Courts.

The first, when the Wife was accus'd of Incapacity by the Husband, or when the Husband being accus'd, did charge his Non-consummation.

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consummation upon his Wife's vicious
Make.

The second, when the Husband to fence
against his Wife's Accusation, did require
or consent that she should be inspected.

In the first Case, the Inspection of the
Wife is as indispensable as that of the
Husband; in the second, the reciprocal
Consent of the Parties take off from the
Irregularity of the Proof.

Be it as 'twill, it is beyond Dispute true,
that Inspection was never order'd by the
Officials, nor confirm'd by the Courts against
the Husband's Consent.

And indeed, had the inspecting of the
Wives been look'd upon as a canonical, re-
gular, and juridical Proof, it must necessa-
rily have been put in Practice in all the Oc-
casions of Impotency, at least, when the
Wives were Virgins at their Marriage.

Now, to shew that this is not the Pra-
ctice of the Officialty of *Paris*, we have ta-
ken out Copies of three Sentences preceded
by three Reports, and no Inspection of the
Wife order'd. These are the foremention'd,
le Page in 1684, *le Roger* in 1694, and *Da-*
mour in 1703. There are two others poin-
ted at in the *Sieur de Combes's* Book, the one
of *Dovenel*, try'd in 1690, the other of *Bo-*
dar Mercer try'd in 1700. In all these
Cases, the Wives, tho' Maids when marry'd,
were

were not visited, the Husbands did not require it.

In the Business of *Cabu* try'd in the Officialty of *Blois*, in that of *le Gloss* try'd in the Officialty of *Rbeims*, (the Decree of which last is reported in the Books under *Anno 1687.*) the Wives, tho' Maids when marry'd, were not expos'd to be visited.

Therefore this abominable Proof by Inspection is not practis'd in the Officialties, without it is requir'd and consented to by the Husband.

Nothing remains, but to run over (with all possible Brevity) the Examples which *Madam de Gesvres* has brought in Opposition.

No Mention is made of such as were prior to the Congress: that Discussion were vain.

Five Examples, posterior, have been brought; three of the Officialty of *Paris*, *le Bret*, *Casalas*, and *Hubineau*; one of *Dijon*, *le Sieur Verdun*; the fifth of *Rennes*, *le Sieur Mercer*.

1st, *Le Bret's* Wife was visited, because she was accus'd of Impotency by her Husband. 'Tis a most certain Truth, the Minutes of the Office shew it.

2dly, In the Affair of *Casalas*, three Observations demonstrate, that the Inspection of the Wife was order'd with his Consent.

The first Observation is grounded upon the Interrogatory of *Casalas*: He excuses his

his Non-consummation, by the Apology of his Wife's Resistance, *who*, he said, *had a certain Reason for it*: They are his very Words.

The second Observation, is, that before the Suit commenc'd the Husband and Wife caus'd themselves to be inspected by the Surgeons. *Casalas* exhibited the Report to the Official, and it was made Part of the Process. Could *Casalas* oppose the inspecting his Wife, he who had voluntarily caus'd her to be inspected before the Process?

Lastly, he was very far from opposing it, since, of his own Accord, he left it to the Official to name Searchers: All these Facts are manifested by the Proceedings upon Record.

3dly, As for *Hubineau*, besides his having a very bad Conformation, and his doubting, himself, whether he had consummated, it is certain he consented to have his Wife visited; consequently 'tis impossible he should build his Appeal upon the Visitation.

The Proof of such his Consent, is recorded in the Decree of Parliament, wherein is a Petition of *Hubineau* the 21st of May 1701, wherein he is for a new Visit by *Matrons and Surgeons*.

The Moment therefore that he concludes his Petition for a Nomination of *Matrons* he necessarily requir'd to have his Wife visited!

visited; consequently his Appeal was not occasion'd by the first Visitation in which he had acquiesc'd.

In the Affair of *Verdun*, try'd in the Officialty of *Dijon*, it is plain from all the Proceedings in that Cause, that he consented to his Wife's Inspection.

We find by the definitive Sentence, that the first Judgment pass'd in 1711 in this Affair, order'd, that with the Consent of the Parties, they proceed to visit the Husband and Wife.

Lastly, As to the Business of the *Sieur Mercer*, try'd in the Officialty of *Rennes*, upon which the Decree of the Parliament of *Bretagne* pass'd, there are several Circumstances which efface all the Inductions they would draw from that Precedent, and upon which they so vainly triumph.

1st, We find by the Interrogatories exhibited to the *Sieur Mercer*, that his Wife charges him *with being infirm the whole Time of his being a Boy, impotent of all his Limbs or Members, without Action and without Motion, ever in a Chair, 'till he was five and twenty.*

2dly, Besides these Defaults of his Complexion, the Searchers Report proves he had very considerable ones in his Conformation; Decency forbids to transcribe them.

3dly, The Sentence which orders the Inspection

spection, says, that it was with Intent to find out and discover whether there was any natural Faultiness in the Wife to hinder Consummation; which proves, that the Wife was suspected of some Defect; the more in that her Husband, in his Answers to the Interrogatories, and in those he exhibited to his Wife to be examin'd upon, complain'd that she would hardly ever let him lie with her.

4thly, 'Tis certain *Mercer* gave his Consent in Writing, by an Instrument dated November 17, 1702, that his Wife should be visited.

After this, we believe we may flatter our selves, that we have solidly confuted the Examples brought by *Madam de Gesvres*. We may then conclude, that never was the inspecting the Wife either order'd in the Episcopal Courts, or authoriz'd in the supream Courts, unless when the Husband's Consent appear'd, or when the Wife was accus'd of something amiss in her Conformation.

Away, for Shame! How can upright and intelligent Judges repose any Confidence in an Inspection?

We have demonstrated the Uncertainty of it, and that it cannot be rank'd among moral Proofs: We have just now shewn that it is not practis'd in the Episcopal Courts

Courts since the Regulation of 1677; at the best, that it was tolerated only in singular Cases.

Moreover, *Madam de Gesvres* grants, that Widows re-marry'd, Wives marry'd when Maidens, but afterwards spoil'd, may not apply for the Relief of this Sort of Proof. She adds, that the Husband cannot force his Wife to suffer an Inspection, unless she consents to't.

And this is the Reason why the Inspection of the Wives can never be juridical nor warrantable, when they accuse their Husbands of Impotency; because the Consequence thereof is not reciprocal, because the Proof depends upon Chance, or the Wife's Humour, and because the Event, whatever it be, cannot be disadvantageous to the Wife, tho' it be she that offers and exposes herself to be inspected.

If thro' Ignorance or Corruption in the Searchers, or by artful Medicaments procur'd by the Wife, she seems to be a Virgin, she triumphs, she insults her Husband's Virility; 'tis with her a just Cause for Dissolution of Marriage. If the Searchers are honest, upright, ingenious, penetrating Men, and declare the Wife to be no Virgin, she presently lays her Defloration upon the brutal Efforts of an Impotent. Thus the *Lady de Lange* brought herself off;

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off; and many more have follow'd her
Example.

Go the Thing how it will, the Husband
can say nothing against them. They are
found to be such as they declar'd themselves
to be. And hence arises the Boldness of
such Wives in demanding to be search'd
they have the cunning of turning the H
vent to their own Advantage, be it success
ful or unsuccessful.

Thus, tho' the Advocate of the other
Side makes a loud Crack with Madam de
Gesures's pretended Virginitie; tho' he
briskly insists upon her being inspected
and seems to demand it, as a demonstrative
Proof; he was sensible, that the Thing
had its Inconveniencies; he has got ready
for his Client the usual Subterfuge of Wives
who have miscarry'd under this Proof.
Let us hear him speak in his own Words
his System is pretty clear, the Artifice ob
vious enough; 'tis in pag. 93. These are
his Words:

*Be pleas'd to observe, Gentlemen, there's
great Difference between a Wife, who say
I'm a Virgin, and a Husband, who says, My
Wife is not a Virgin. If the Wife speaks
true, 'tis a hundred to one but the Husband
is impotent. . . . But if 'tis the Husband that
speaks true, the Consequence which flows from
the Wife's Condition, has hardly any Force*

and

and 'tis then but an even Wager that the Husband is capable. . . . And in Truth a Virginity lost, proves but very imperfectly the Husband's Perfection; whereas a Virginity not lost, carries with it a moral Certainty of his Imperfection, or, if you will, of his Impotency.

Therefore the Issue of the Visitation can never be otherwise than favourable to the Wife, and fatal to the Husband. If the Wife is a Virgin, 'tis a hundred to one, 'tis a Certainty that the Husband's impotent; he must be cut off from Society, and be forbid the Sacrament. If the Wife is not a Virgin, the Consequence which flows from the Wife's Condition, has scarce any Force; and 'tis then but an even Wager that the Husband is capable: A lost Virginity, does not prove the Husband's Perfection.

What a Sort of a Proof then is this to which they would stake down the Condition of a Husband, and the Validity of a Sacrament? The Fathers of the Church, the Theologists, the Casuists, the Physicians, the Anatomists, all Authors cry out against the Uncertainty, the Fruitlessness of Visitation. According to Madam de Gesvres's own System, 'tis a Trap set for Virility: Must not a Man have made a surrender of his Reason, to consent to a proof whose Event cannot operate towards reciprocal Argument? Can Equity, the publick

publick Peace, permit so absurd and so equivocal a Proof to be made Use of?

And yet if we dive to the Bottom off this Wickedness, we shall find it stand thus: If the Husband that is accus'd of Impotency, consents to have his accusing Wife visited, he runs all the Hazards of the Ignorance, the Prejudice, or the Corruption of the Searchers or the Matrons; the Uncertainty or the Contrariety of the Reports, are likewise retorted upon him. May hee not be the Dupe of Fiction? For let the Thing happen as it may, the Wife criess out, if I cease to be a Virgin, 'tis not owing to the usual Operations of Nature, but to the Attempts of a brutal Fury; if I am conquer'd, 'tis with foreign and impure Arms. In short, if we consult Madam *de Gesures*, she tells us, *That the Proof which flows from the Wife's Condition has no Force* and tho' the Wife, when visited, does not prove to be a Virgin, 'tis an even Wager still *that the Husband is impotent.*

If the Husband opposes the Visitation; if he is so wise as to decline the Hazards of it; if he maintains, that since the Abolition of the Congress a good Conformation join'd to a Habit of Body is the only physical Proof that may be admitted; if he adds that being accus'd of Impotency, his Person alone ought to be search'd for Conviction; if

he borrows the Language of the Fathers and of the Church, to represent the Horribleness and Ignominy of this monstrous and insignificant Prostitution; if he demonstrates, that the Visitation is a defective and uncertain Proof, as well as absurd and wicked; that neither the Church, Equity, nor publick Order can endure it; he is born down by Error, he adds a fresh Triumph to the rash and unjust Accusation of his Wife.

In another Place of *Madam de Gesvres's* Pleadings, there is this Paragraph, *Let us ask those perfect Husbands, those compleat Men, if in the Marquis de Gesvres's Circumstances, they would stand upon Niceties, and believe, like him, that an Inspection by Matrons and Searchers would be such a Prophanation of a Wife, as to make her unworthy of their Embraces. Methinks I hear them cry aloud, let her be deliver'd over to the Searchers o' God's Name; let the whole Faculty, both of Physick and Surgery, exhaust their Speculations upon her; I don't fear her being found in any other Condition, than what a Wife should be in, after three Years conjugal Cohabitation.*

This is the Language they put into the Mouth of a young Lady, bred up, as they say, from her Infancy in the Bosom of Religion and Vertue. The Writings that are publish'd under her Name, are full of the strangest paradoxes! She is made to confess, that Visitation is not practicable, but in very extraordinary Cases; that it is uncertain; that the Event, be it what it will, cannot be advantageous to the Husband.

In Effect, let the Wife be a Virgin, it signifies nothing, according to her, towards deciding the Virility of the most perfect Husbands; and yet the Husbands must be subject to it: All Mankind are interrogated; they are represented as crack-brain'd; they are made to run headlong upon their Shame; they are made to embrace all the Hazards, all the Risks of Ignorance, Secrecement, Leger-de-main Tricks, Uncertainty, Inutility, Iniquity of the Visitation. How absurd is all this!

And yet some People suffer themselves to be led away by artful Declarations; may we not say, that Self

Self-Love contributes to their being impos'd upon. It looks as if they fear'd they should be suspected of Impotency, by espousing the Part of the Accus'd; they are convinc'd in their Hearts, that it is espousing the Part of Reason, Truth, and Justice.

But it is likewise to be hop'd, that wise and intelligent Persons; they who have an upright Heart, and are willing to be instructed; they who with Honour, Religion, and Modesty are of any Value; they who value Equity and the publick Order, surely this is the Majority, and 'tis to them (that we write) 'tis to be hop'd, I say, that such will be touch'd, that they will be convinc'd by the Arguments, and by the Reflections just now offer'd them.

We believe we have made full Answer, on the Behalf of the Marquis de Gesvres, to all the Objections that seem'd worthy of any Regard.

As for the abusive Language, the Investives, insipid Jest, the insulting Airs, the stinging Satire, the biting Speeches, interspers'd throughout the Answer, in every Page, in every Period, and almost in every Line, we at first resolv'd to make no Answer thereto, *Quoniam si id ex levitate processerit, contemnendum est; si ex insania, miseratione dignissimum; si abominabile, remittendum.* Unic. Cod. si quis imperatori dixerit.

M. ARRAULT, Counsellor
FOULON, Procureur

F I N I S.

